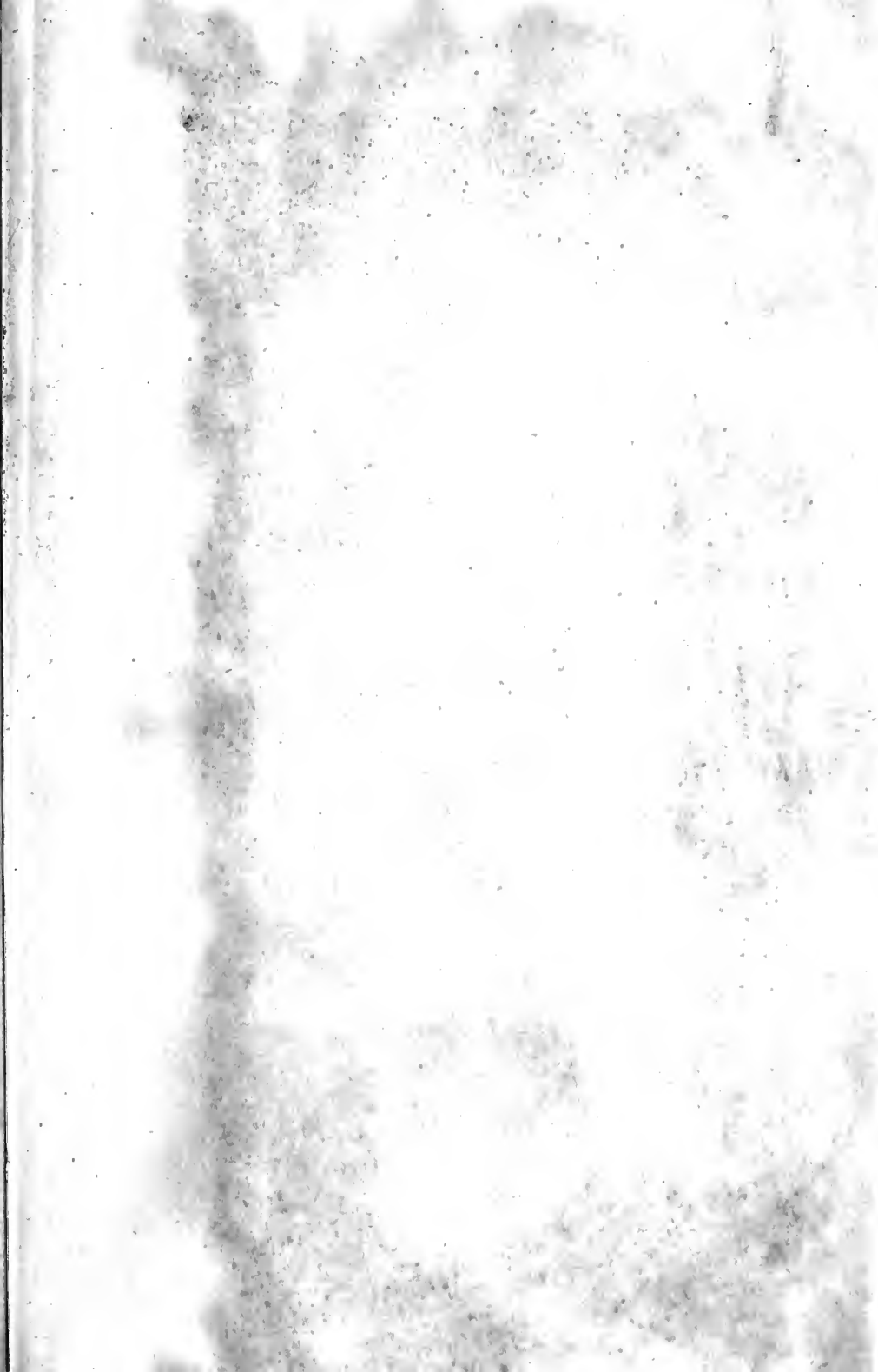


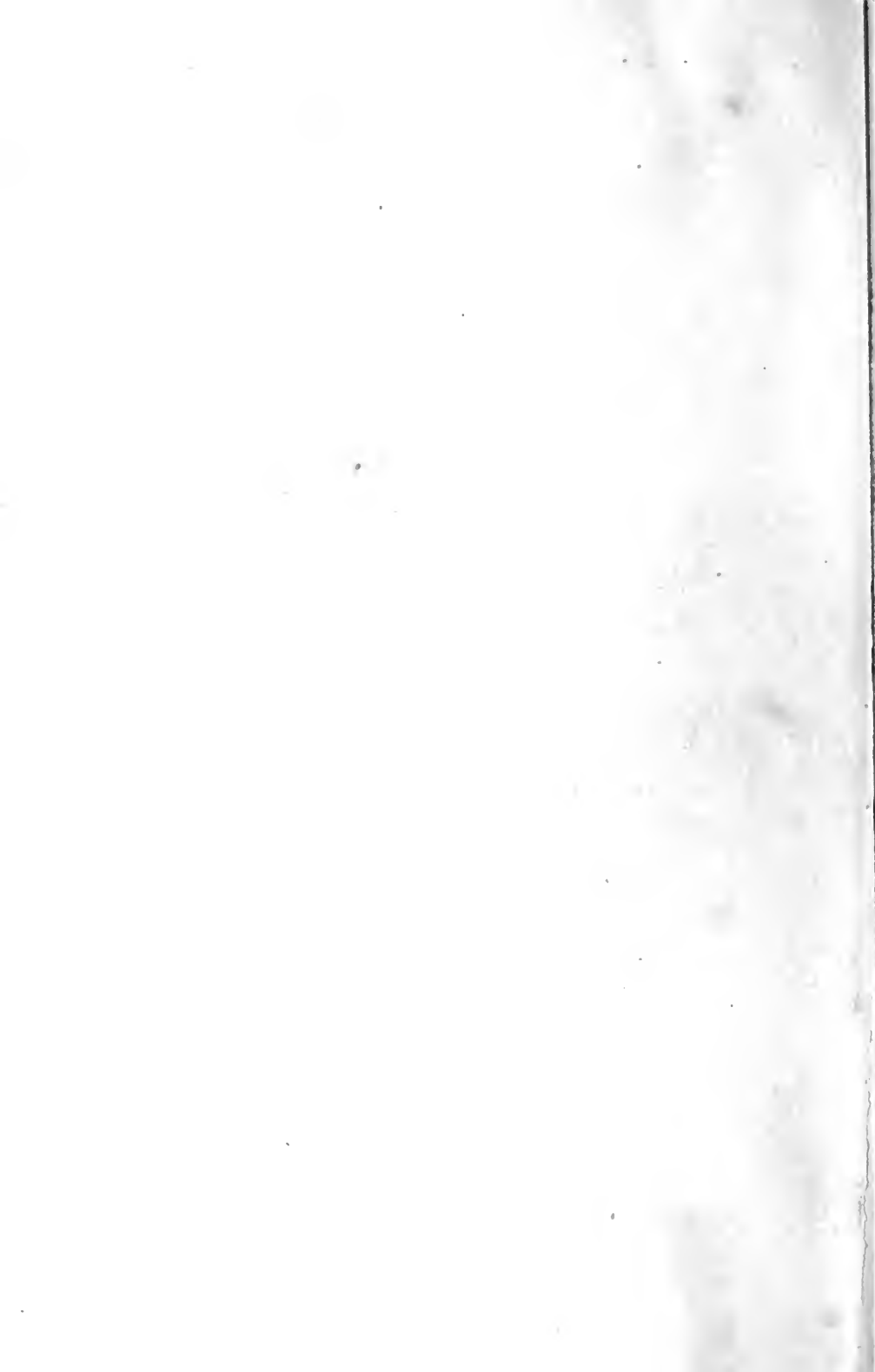
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A TREATISE
ON THE LAW OF
FRAUD AND MISTAKE

BY

WILLIAM WILLIAMSON KERR, A.M., OXON.,
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ADDENDA.

- Page 131. The effect of the order giving to a person standing in a fiduciary relation to another person leave to purchase the property which is the subject of such relation is to divest the former altogether of his fiduciary relation, and to put him at arms' length with the vendors. He is therefore under no obligation to disclose anything he knows about the property ; *Boswell v. Coaks*, W. N. (1883), 53 ; 74 L. T. 354.
- „ 210, n. (z). *Hickson v. Darlow* is now reported on appeal, 31 W. R. 417.
- „ 212. The effect of sect. 8 of the Bills of Sale Act, 1882, is to avoid an unregistered bill of sale as against an execution creditor of the grantor only to the extent necessary to satisfy the execution ; *Ex parte Blaiberg*, W. N. (1883), 44.
- „ 212, 213, 214. In *Davis v. Burton*, *ib.* 54, a bill of sale was held void on the ground that the provision for immediate payment of the whole of the capitalised interest upon breach of any of the covenants, and also the covenants themselves, which were an attempt to evade the provisions of sect. 7 of the Bills of Sale Act, 1882, were not in substantial conformity with the form given in the Schedule to the Act.
- „ 224, n. (h). *Re Lloyd* is now reported, 48 L. T. N. S. 123.
- „ 234. A debt incurred by fraud is preserved by sect. 49 of the Bankruptcy Act, 1869, *Ross v. Gutteridge*, 52 L. J. Ch. 280.
- „ 327, n. (q). *Abouloff v. Oppenheimer* is now reported, 10 Q. B. D. 295.
- „ 317. In *Re Exchange Banking Co.*, 52 L. J. Ch. 214, the directors of a company were held liable under sect. 165 of the Companies Act, 1862, to repay the amount of dividends declared and paid during their directorship.

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A TREATISE

ON THE

LAW OF FRAUD AND MISTAKE.

PART I.—FRAUD.

CHAPTER I.

GENERAL CONSIDERATIONS.

It is not easy to give a definition of what constitutes fraud in the extensive signification in which that term is understood by civil Courts of Justice. Courts of Justice have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud (*a*). Fraud is so various in form and colour that it is difficult, if not impossible, to confine it within the limits of any precise definition. The fertility of man's invention in devising new schemes of fraud is so great, that courts of equity have declined the hopeless attempt of embracing in one formula all its varieties of form and colour, reserving to themselves the liberty to deal with it under whatever form it may present itself. As new devices of fraud are invented, they will be met by new correctives (*b*). Fraud, in the contemplation of a civil court of justice, may be said to include properly all acts, omissions, and

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What is fraud.

(*a*) *Lawley v. Hooper*, 3 Atk. 279. Kaimes, Life of Lord Kaimes, vol. 2,
 (*b*) *Sawyer v. Vernon*, 1 Vern. p. 341; *Anderson v. Fitzgerald*, 4
 387; *Lawley v. Hooper*, 3 Atk. 279; H. L. 511, *per* Lord St. Leonards;
Webb v. Rorke, 2 Sch. & Lef. 666. *Nicoll v. Fleming*, 19 Ch. D. 267, *per*
 Lord Hardwicke's Letter to Lord Bacon, V. C.

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concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another (*c*). All surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one is considered as fraud (*d*). Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to, either at law or in equity (*e*). By fraud, said Le Blanc, J. (*f*), he understood an intention to deceive, whether from an expectation of advantage to the party himself, or from ill-will towards another. Collusion is considered as a fraud (*g*):-

The Roman juriconsults attempted definitions of fraud, two of which are here given: "*Dolum malum Servius quidem ita definit, machinationem quandam alterius decipiendi causa, cum aliud simulatur et aliud agitur. Labeo autem posse et sine simulatione id agi ut quis circumveniatur; posse et sine dolo malo aliud agi, aliud simulari; sicuti faciunt qui per ejusmodi dissimulationem deserviant et tuentur vel sua vel aliena; itaque, ipse sic definit, dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitum. Labeonis vera definitio est*" (*h*). The civil code of France, without giving a definition, provides in Art. 1116: "Fraud is a ground for avoiding a contract where the devices (*les manœuvres*) practised by one of the parties are such as to make it evident that without these devices the other party would not have contracted."

Elements of fraud.

However difficult it may be to define what fraud is in all cases, it is easy to point out some of the elements which must necessarily exist before a party can be said to have been defrauded. In the first place, it is essential that the means used should be successful in deceiving. However false and dishonest the

(*c*) 1 Fonb. Eq. Book 1, c. 2, s. 3;
Story Eq. Jur. 187.

(*d*) Finch, 439.

(*e*) *Green v. Nixon*, 23 Beav. 535.

(*f*) 2 East, 108.

(*g*) *Garth v. Cotton*, 3 Atk. 757;
Bromley v. Smith, 26 Beav. 671;
Spackman's case, 34 L. J. Ch. 321.

(*h*) Dig. lib. iv., tit. 3, leg. 1.

artifices or contrivances may be by which one man may attempt to induce another to contract, they do not constitute a fraud if that other knows the truth and sees through the artifices or devices. *Haud enim decipitur qui scit se decipi.*

Next, there can be no fraud without dishonest intention. However false may be the representations of one party to another to induce him to enter into a contract, there is no ground for avoiding it as obtained by fraud if the party making the representation honestly believed it to be true.

Lastly, there must be damage to the party deceived, even where there is a wilful false representation, before a cause of action can arise. Fraud without damage or damage without fraud gives no cause of action (*i*). But fraud gives a cause of action if it leads to any sort of damage (*j*).

The variety of forms which fraud may assume would seem to set all systematic classification at defiance, but Lord Hardwicke has done much towards simplifying that branch of the subject which relates to fraud in matters of contract by dividing it into four heads. Firstly, actual fraud, or *dolus malus*, arising from facts and circumstances of imposition; secondly, fraud arising from the intrinsic nature and subject of the bargain; thirdly, fraud which may be presumed from the circumstances and condition of the parties contracting; fourthly, fraud which may be collected and inferred from the matter and circumstances of the transaction as being an imposition and cheat on other persons not parties to the transaction (*k*).

Lord Hardwicke's classification of forms of fraud.

Civil courts of justice do not affect to consider fraud in the light of a crime; it is not their province to punish (*l*); nor have they any censorial authority (*m*); they interfere in cases of fraud in a civil and not in a criminal point of view.

Fraud not punishable as a crime.

Civil courts of justice have an original, independent, and inherent jurisdiction to relieve against every species of fraud (*n*),

Jurisdiction over every species of fraud except fraud of a penal nature,

(*i*) 3 Bulst. 95, per Croke, J., *Pasley v. Freeman*, 3 T. R. 51, per Buller, J.

(*j*) *Smith v. Kay*, 7 H. L. 775, per Lord Wensleydale.

(*k*) *Chesterfield v. Jannsen*, 2 Ves. 155, 156.

(*l*) See *Waltham v. Broughton*, 2 Atk. 43.

(*m*) See 2 V. & B. 298.

(*n*) *Colt v. Woollaston*, 2 P. Wms. 156; *Steel v. Baylis*, ib. 219; *Franks v. Weaver*, 10 Beav. 297; *Glasse v. Marshall*, 15 Sim. 71.

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not being fraud of a penal nature. Every transfer or conveyance of property, by what means soever it be done, is in equity vitiated by fraud. Deeds, obligations, contracts, awards, judgments or decrees may be the instruments to which parties may resort to cover fraud, and through which they may obtain the most unrighteous advantages, but none of such devices or instruments will be permitted by a court of equity to obstruct the requisitions of justice. If a case of fraud be established, the court will set aside all transactions founded upon it by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. It is immaterial whether such machinery and contrivance consisted of a decree in equity and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud (o).

"The general rules of construction," said Tindal, C. J., in *Warburton v. Loveland* (oo), "which have been established from the earliest times require a large and liberal interpretation of any provisions made for the suppression of fraud. In *Heydon's Case* (p) the Barons of the Exchequer resolved that the construction of the statute then under consideration before them must be made by enquiring what was the mischief and defect against which the common law did not provide, 'what remedy the Parliament had appointed to cure the disease of the commonwealth and what was the true reason of the remedy,' and the construction which follows in the report is one that never ought to be lost sight of in any case, namely, that 'the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the

(o) *Bowen v. Evans*, 2 H. L. 281. See *South Sea Co. v. Bumpstead*, 3 Vin. Ab. 140; *Richmond v. Tayleur*, 1 P. Wms. 736; *Filmer v. Gott*, 4 Bro. P. C. 230; *White v. Hall*, 12 Ves. 324; *Hérbert v. Bulkeley*, Ridg. 300; *Brydges v. Branfill*, 12 Sim.

369; *Robinson v. Lord Vernon*, 7 C. B. N. S. 231; *Rogers v. Hadley*, 32 L. J. Exch. 241; *Flower v. Lloyd*, 6 Ch. D. 297; 10 Ch. D. 327; *ex parte Cockerell*, 4 C. P. D. 39.

(oo) 2 Dow. & Cl. 497.

(p) 3 Rep. 7.

Act *pro bono publico*.' This principle of construction has always been adopted by courts of justice." Chap. I.

The distinction between legal or equitable and criminal jurisdiction in matters of fraud is well laid down in *Burnes v. Pennell* (q). It is the superadded guilty intention which gives the criminal jurisdiction. A man may not have intended to deceive, and may have believed that he did not, when he was really suppressing the truth and suggesting what was false. If so, he is not liable to an indictment in a criminal court, but in a civil proceeding it is different. If a man makes a misrepresentation in point of fact, whether by suppressing the truth or suggesting what is false, however innocent his motive may have been, he is equally responsible in a civil proceeding as if he had while committing these acts done so with a view to injure others or to benefit himself (r).

If the subject matter of the transaction be a contract no man is bound by a bargain into which he has been induced by fraud to enter, because assent is necessary to a valid contract, and there is no real assent when fraud and deception have been used as instruments to control the will and influence the assent. But a contract or other transaction induced or tainted by fraud is not void, but only voidable at the election of the party defrauded (s). Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded (ss).

(q) 2 H. L. 497.

(r) *Peek v. Gurney*, 6 E. & L. App. Cas. 409, per Lord Cairns; 13 Eq. 113, per Lord Romilly.

(s) *Clarke v. Dickson*, El. Bl. & El. 148; *Rawlins v. Wickham*, 3 D. & J. 322; *Western Bank of Scotland v. Addie*, 1 Sc. App. Ca. 156; *Oakes v. Turquand*, 2 E. & L. App. Ca. 346; *Hunter v. Walters*, 7 Ch. 86. In the case of fraud against creditors by debtors conveying to others their

lands, goods, or chattels without valuable consideration, conveyances are absolutely void by the statute 13 Eliz., c. 5, s. 1, without any further step. *Billiter v. Young*, 6 E. & B. 17, per Lord Wensleydale.

(ss) *Oakes v. Turquand*, 2 E. & L. App. Ca. 375; *Reese River Silver Mining Co. v. Smith*, 4 E. & L. App. Ca. 64; *Moyce v. Newington*, 4 Q. B. D. 35.

Distinction
between legal
and criminal
jurisdiction.

Contract
induced by
fraud.

Voidable, not
void.

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"The fact," said Lord Blackburn, in delivering the judgment of the Court in the Exchequer Chamber in *Clough v. London and North Western Railway*, (t) "that the contract has been induced by fraud does not make the contract void or prevent the property passing, but merely gives the party defrauded a right on discovering the fraud to elect whether he shall continue to treat the contract as binding or disaffirm the contract and resume the property. If it can be shown that the party defrauded has at any time after knowledge of the fraud either by express words or by unequivocal acts affirmed the contract, his election is determined for ever. The party defrauded may keep the question open so long as he does nothing to affirm the contract. The question always is, has the person on whom the fraud has been practised, having notice of the fraud, elected not to avoid the contract? or, has he elected to avoid it? or, has he made no election? As long as he has made no election he retains the right to determine it either way, subject to this—that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong doer is affected, he will lose his right to rescind."

Persons accordingly who have been induced by the fraud of the directors of a company to become shareholders in the company cannot, as against creditors of the company after a winding-up order has been made, repudiate their liabilities as shareholders after discovering the fraud (u); so also where an agent in possession of a bill of lading and authorised to sell the goods comprised in it and to hand over the bill of lading to a purchaser of the goods, is induced by fraud to enter into a contract of sale of the goods and hands over to the purchaser the bill of lading, the property vests in the purchaser, and when, before the sale was disavowed, the purchaser entered into a verbal contract with

(t) L. R. 7 Exch. 34. The judgment was read by Mr. Justice Blackburn.

(u) *Oakes v. Turquand*, 2 E. & I. App. Ca. 375.

the plaintiff for an advance upon the security of the goods with a power of sale, and the plaintiff advanced the money and received the dock warrants in order that they might obtain a constructive possession of the goods, it was held that the plaintiff had a good equitable title to the money advanced on the goods (x).

When goods or chattels are obtained by fraud, a distinction exists between cases where the facts show a sale to the party guilty of the fraud and cases where the facts show a mere delivery of goods or chattels into his possession, induced by fraudulent devices, tricks, or pretences, on his part. Where the facts show a contract of sale the owner is taken in law to intend to transfer the property in as well as the possession of the goods or chattels to the person guilty of the fraud; but where the facts show that there has been no sale and that the intention of the owner of the goods or chattels was not to pass the property but merely to part with the possession of the goods or chattels, he who obtains such possession by fraudulent tricks or devices can convey no property to any third person, however innocent, for no property has passed to himself from the true owner (y).

Goods obtained by felony or a trick as distinguished from goods obtained by fraud.

Where for example a man obtained possession of goods under the fraudulent misrepresentation that he was authorised to buy them for a principal with whom the owner of the goods thought he was dealing, and to whom the contract of sale purported to be made, it was held that as there was in fact no contract to support the possession, the owner might recover the goods from a transferee to whom the fraudulent possessor had sold or pledged them, although he took them *bonâ fide* and without notice of the fraud (z). So also where a man, by misrepresenting himself to be a member of the firm with whom the owner of the goods

(x) *Attenborough v. St. Katherine's Docks Co.*, 3 C. P. D. 465.

(z) *Hollins v. Fowler*, 7 E. & I.

(y) *Kingsford v. Merry*, 1 H. & N. App. Ca. 757.

503; *Pease v. Gloahec*, L. R. 1 P. C.

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thought he was dealing, and to whom he intended to sell the goods, obtained the delivery of the goods to himself and then pledged them with a third party, it was held that as there was in fact no contract affecting the latter, and the property in the goods had not passed, the owner of the goods might recover them notwithstanding the pledge (*a*). So also where a man obtained the possession of goods by taking advantage of a similarity of name and address to misrepresent himself to be a person known to the seller and supposed by him to order the goods, and to whom he intended to deliver them, it was held to be a mere fraud without any contract to support a transfer of the property, and that the goods might be recovered from a third party to whom they had been sold, although he bought them *bonâ fide* and without notice of the fraud (*b*). But where the person obtaining the possession of the goods is in the position in fact of an agent entrusted with them within the Factor's Act, 5 & 6 Vict. c. 39, though the entrusting is effected by means of a fraud, a pledge by him before revocation of the authority is valid by force of the Act (*c*).

Goods and chattels, though obtained by felony or false pretences, cannot be reclaimed from a *bonâ fide* purchaser who has purchased them in market overt (*d*), but, unless they have been purchased in market overt, any person who however innocently obtains possession of the goods of a person who has been fraudulently deprived of them under such circumstances that there is no contract to support the possession, and disposes of them, whether for his own benefit or that of any other person, is guilty of conversion (*e*). Where, for example, a man had fraudulently obtained possession of goods, and a broker, who was ignorant of the fraud, purchased them from him in the belief and expecta-

(*a*) *Hardman v. Booth*, 1 H. & C. 4 C. P. 93; *Vickers v. Hertz*, 2 Sc. 803. App. Ca. 113.

(*b*) *Cundy v. Lindsay*, 3 App. Ca. 468. (*d*) See *Moyce v. Newington*, 4 Q. B. D. 35.

(*c*) *Sheppard v. Union Bank*, 7 H. & N. 661; *Fuentes v. Montis*, L. R. App. Ca. 757. (*e*) *Hollins v. Fowler*, 7 E. & I.

tion that one of his ordinary clients would accept the goods, and the client did accept them, it was held that the broker had made himself a principal, and by transferring the goods to his client had committed an act of conversion, which made him liable in trover to the real owner of the goods (*f*). So also a salesmaster who sells in market overt and delivers a stolen chattel, although he does so innocently in the ordinary course of business, is responsible to the true owner for the value of the chattel (*g*). The privilege of market overt exists in law for the protection of the purchaser who innocently buys in the open market, and does not extend to the seller, however innocent he may be (*h*). Under statute 24 & 25 Vict. c. 96, s. 100, the property of a stolen chattel, though bought in open market, reverts in the owner on the conviction of the thief (*i*). In the meanwhile, until conviction, the stolen chattel is the property of the purchaser (*j*).

The Act 24 & 25 Vict. c. 96, s. 100, only applies to cases in which possession has been obtained without the property passing. Though a vendor has been induced to sell by the fraud of the buyer, and though it is competent to the vendor by reason of such fraud to avoid the contract, yet till he does some act to avoid it, the property remains in the buyer, and if he in the meantime has parted with the thing sold to an innocent purchaser, the title of the latter cannot be defeated by the original vendor (*k*). In the present case, the Court said (*l*) there was no property in the prosecutor at the time of the conviction. He had parted with it by a contract which, though voidable, ceased on the sale before it had been avoided to be any longer voidable.

A distinction must be taken between cases where a man executes an instrument with the mind and intention to execute it, though his assent may have been obtained by fraud, and

Instruments executed through a trick as distinguished from instruments executed through fraud.

(*f*) *Ib.*

(*g*) *Ganley v. Ledwidge*, 1 R. 10 C.

L. 33.

(*h*) *Ib.*

(*i*) *Scattergood v. Sylvester*, 15 Q.

B. 508.

(*j*) *Walker v. Matthews*, 8 Q. B. D.

109.

(*k*) *Moyce v. Newington*, 4 Q. B. D.

35.

(*l*) *Ib.*

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cases where a man is by fraudulent contrivances induced to put his hand and seal to an instrument which he never intended and had no mind to execute. In *Thoroughgood's Case* (*m*), it was held, that if an illiterate man have a deed falsely read over to him, and he then seals and delivers the deed, the deed was nevertheless not his deed. In a note to *Thoroughgood's Case*, it is suggested that the doctrine is not confined to the condition of an illiterate grantor, and a case in Keilway's Reports (*n*) is cited in support of this observation, where one of the judges did say that it made no difference whether the grantor was lettered or unlettered. That, however, was a case in which the grantee himself was the defrauding party. But the position that if a grantor or covenantor be misled as to the actual contents of the deed, the deed does not bind him, is supported by many authorities (*o*), and is recognised by Bayley, B., in the Court of Exchequer, in the case of *Edwards v. Brown* (*p*). In *Vorley v. Cooke* (*q*), Stuart, V. C., said, that if a man having no mind or intention to execute a particular instrument does what he does with the mind and intention to execute a deed of a different kind and for a different purpose from that which by fraud and deceit was substituted, the deed is not voidable but void, and no estate passes at least as between the parties to the instrument and parties taking with notice. When, accordingly, a man intending to execute a covenant to produce title-deeds, put his hand and seal to a deed which was falsely and fraudulently read over to him, and represented as being a covenant to produce, when, in fact, it was a mortgage, the deed was held void as being a cheat and a trick (*qq*). So also in *Foster v. McKinnon* (*r*), where the defendant's signature to a document was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, it was held, that he was not liable, if he was not guilty of negligence,

(*m*) 2 Co. Rep. 9b.(*q*) 1 Giff. 234.(*n*) 70 Pl. 6.(*qq*) *Ib.* : *Lee v. Angus*, 15 W. R.(*o*) See Com. Dig. Fait B. 2.

119.

(*p*) 1 Cr. & J. 312 ; see *Foster v.*(*r*) L. R. 4 C. P. 711.*McKinnon*, L. R. 4 C. P. 711.

on the ground that he never intended to sign, and therefore in contemplation of law never did sign the document to which his name was appended.

In *Hunter v. Walters* (s), the solicitor of two mortgagees pretended, without the authority or knowledge of either of them, to sell the mortgaged estate under a power of sale contained in the second mortgage, and had the estate knocked down to a purchaser who was really a nominee of his own. He got the two mortgagees to execute conveyances to himself, and to sign receipts for the consideration money. In the action one of the mortgagees deposed that he executed the deed without reading it, believing the solicitor's assertion that it was only a transfer of the mortgagor's interest, and a mere form as far as concerned himself: the other mortgagee was dead, and there was no evidence of the manner in which he was induced to execute the conveyance. The solicitor had deposited the conveyance with a party who made an advance on it without notice of the fraud. Malins, V. C., held that this latter party was entitled to priority over both the two mortgagees who had been so cheated by the solicitor, and on appeal by the second of the two original mortgagees, that decision was affirmed by the full Court. The Lord Chancellor and the Lords Justices were unanimous in holding that the conveyance which the two mortgagees had executed was not void, and they put the case on the ground that these two gentlemen having confided in their solicitor to the extent of executing the conveyance without reading it, they must suffer for their agent's fraud, and not the stranger who dealt with the agent, upon the common rule of equity that the principal who trusts his agent is the party to suffer for the agent's fraud, and not the stranger who deals with the agent. Lord Justice James, without disputing the correctness of the equitable relief given in *Vorley v. Cooke*, declined to support the dictum that the facts in that case would have sustained at law a plea of *non est factum*. Lord Justice Mellish, speaking of the argument that a deed procured by false representation of the contents of the deed is at law necessarily void *ab initio*, said: "It is a doubtful

(s) 7 Ch. 75.

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question whether if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might by very simple means have satisfied himself as to what the contents of the deed really were, may not by executing it negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it" (t).

Similar considerations attach to the case of forged instruments. No estate can pass under a forged instrument (u), but in special cases an innocent party whose title to property is derived under a forged instrument may, as against the party on whom the forgery has been practised, have a better equity to the retention of the property (x).

If a transaction has been originally founded on fraud, the original vice will continue to taint it, however long the negotiation may continue, or into whatever ramifications it may extend (y). Not only is the person who has committed the fraud precluded from deriving any benefit under it, but an innocent person is so likewise, unless there has been some consideration moving from himself (z).

In equity no length of time will run to protect or screen fraud (a). "Those," said Lord Cottenham in *Trevelyan v. Charter* (b), "who may be disposed fraudulently to appropriate to themselves the property of others, may be assured that no time will secure them in the enjoyment of their plunder; but that their children's children will be compelled by this Court to

(t) See *Cooper v. Vesey*, 20 Ch. D. 629.

(u) *Esdaille v. La Nauze*, 1 Y. & C. 394; *Boursot v. Savage*, 2 Eq. 134; *Cooper v. Vesey*, 20 Ch. D. 629.

(x) *Jones v. Powles*, 3 M. & K. 581.

(y) *Bridgman v. Green*, 2 Ves. 626; *Reynell v. Sprye*, 1 D. M. & G. 660, 697; *Bowen v. Evans*, 2 H. L. 281; *Smith v. Kay*, 7 H. L. 750, 775.

(z) *Scholfield v. Templer*, Johns,

165, 4 D. & J. 429; *Topham v. Duke of Portland*, 1 D. J. & S. 569, per Turner, L. J.; *Traill v. Smith's Trustees*, 3 Dec. of Court of Session, 4th series, 777; *Clydesdale Bank v. Paul*, 4 Dec. of Court of Session, 4th series, 628.

(a) *Cotterell v. Purchase*, Forrest, 61; *Irvine v. Kirkpatrick*, 7 Bell, Sc. App. Ca. 186; *Allfrey v. Allfrey*, 1 Mac. & G. 99; *Bowen v. Evans*, 2 H. L. 257; *Walsham v. Stainton*, 1 D. J. & S. 678.

(b) 4 L. J. Ch. N. S. 214.

Original vice continues to taint a transaction founded on fraud.

No length of time will protect fraud.

restore it to those from whom it has been fraudulently abstracted." The right of the party defrauded to have the transaction set aside, is not affected by lapse of time, so long as he remains without any fault of his own in ignorance of the fraud which has been committed (*bb*). The equity is not confined to the party defrauded, but extends to heirs at law in respect of frauds committed on their ancestor (*c*).

A man cannot repudiate a transaction as far as it is onerous to himself and adopt it as far as it is beneficial. He must be able to deal with the whole either by adopting or rejecting it *in toto* (*d*). There may, however, be cases in which the same transaction may be good as to part and for certain purposes, although voidable as to other parts and for other purposes (*e*). If a transaction is fair as between the parties to it, it is not invalid merely because it may have been concocted and brought about by a third party with a fraudulent intention of benefiting himself. In such a case, as far as regards the third party, the whole may be looked upon as one transaction in order to judge of his motives and to put a construction upon his acts; but, as regards the other two, who, though affected by one part of the transaction, may be total strangers to the other part, it is not only not necessary, but it would be unjust to consider every part of the transaction affected by objections, which, in fact, apply only to particular portions of it (*f*). If, for instance, a man brings about an arrangement between father and son, in order that he might afterwards deal with the son, the motive might be most improper, but the arrangement between father and son must be judged of upon its own merits (*g*). Nor is an instrument which has been entered into between parties for a purpose which may be considered fraudulent as against a third party necessarily invalid as between themselves (*h*).

A transaction cannot be repudiated by a man as far as it is onerous and adopted as far as it is beneficial.

A transaction may be good as to parts and for certain purposes, and bad as to other parts and for other purposes.

(*bb*) *Blair v. Bromley*, 2 Ph. 361; *pherson*, 3 App. Ca. 831; *Sheffield Rolfe v. Gregory*, 4 D. J. & S. 579; *Nickel Co. v. Unwin*, 2 Q. B. D. 223.
Vane v. Vane, 8 Ch. 383.

(*c*) *Falkner v. O'Brien*, 2 Ba. & Be. 221.

(*e*) *Bellamy v. Sabine*, 2 Ph. 425, 437.

(*d*) *Bellamy v. Sabine*, 2 Ph. 450; *Hanson v. Keating*, 4 Ha. 1; *Great Luxemburg Railway Co. v. Magnay*, 25 Beav. 594; *Urquhart v. Mac-*

(*f*) *Ib.* 438.

(*g*) *Ib.*

(*h*) *Shaw v. Jeffery*, 13 Moo. P. C. 432.

Chap. I.

Duty of the
Court in dealing
with cases of
alleged fraud.

Although it is the undoubted duty of the Court to relieve persons who have been deceived by the fraud of others, it is equally the duty of the Court to be careful that in its anxiety to correct frauds it does not enable persons who have joined with others in speculations, to convert their speculations into certainties at the expense of those with whom they have joined (*i*).

(*i*) *Jennings v. Broughton*, 5 D. M. v. *Chadwick*, 20 Ch. D. 67, *per* Jessel & G. 140, *per* Turner, L. J. ; *Smith* M. R.

CHAPTER II.

MISREPRESENTATION—CONCEALMENT.

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THE largest class of cases in which Courts of Justice are called upon to give relief against fraud, is where there has been a misrepresentation or *suggestio falsi* (a). If a man represents, as true, that which he knows to be false, and makes the representation in such a way or under such circumstances as to induce a reasonable man to believe that it is true, and is meant to be acted on, and the person to whom the representation has been made, believing it to be true, acts upon the faith of it, and by so acting sustains damage, there is fraud to support an action of deceit, and to be a ground for the rescission of the transaction (b). It is not, however, necessary, in order to constitute fraud, that a man who makes a false representation should know it to be false. It is enough that it be false, if it be made recklessly without any reasonable grounds for believing it to be true, or under circumstances which show that he was careless whether it was in fact true or false, and be made deliberately and in such a way as to give the person to whom it is made reasonable ground for supposing that it was meant to be acted on, and has been acted on by him accordingly (c). If a man

Misrepresentation.

(a) *Broderick v. Broderick*, 1 P. J. 518.
Wms. 240; *Jarvis v. Duke*, 1 Vern. 20.

(b) *Evans v. Bicknell*, 6 Ves. 174; *Edwards v. McCleay*, 2 Sw. 287; *Adamson v. Evitt*, 2 R. & M. 71; *Attwood v. Small*, 6 Cl. & Fin. 233; *Gerhard v. Bates*, 2 E. & B. 475; *Jennings v. Broughton*, 6 D. M. & G. 126; *Rawlins v. Wickham*, 3 D. & J. 304; *Slim v. Croucher*, 1 D. F. &

(c) *Taylor v. Ashworth*, 11 M. & W. 413; *West v. Jones*, 1 Sim. N. S. 207; *Evans v. Edmonds*, 13 C. B. 786; *Thom v. Bigland*, 8 Exch. 725; *Hutton v. Rossiter*, 7 D. M. & G. 23; *Rawlins v. Wickham*, 3 D. & J. 304; *Swan v. North British Australian Co.*, 2 H. & C. 182; *Hart v. Swaine*, 7 Ch. D. 46; *Redgrave v. Hurd*, 20 Ch. D. 13.

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asserts that to be true within his own knowledge, which he does not know to be true, or makes an assertion of fact as to which he is ignorant whether such assertion is true or untrue, and it is, in fact, untrue, he is, in a civil point of view, as responsible as if he had asserted that which he knew to be untrue (*l*). It is a wrong to state as true what the person making such statement does not know to be true, even though he does not know it to be false, but believes without sufficient grounds that the statement will ultimately turn out to be correct (*m*). There is indeed fraud, if when a man thinks it highly probable a thing exists, he chooses to say that the thing exists, if it does not in fact exist (*n*).

Fraudulent
intent.

An intention to deceive being a necessary element or ingredient of fraud, a false representation does not amount to a fraud at law, unless it be made with a fraudulent intent. There is a fraudulent intent if a man either with the view of benefiting himself or misleading another into a course of action which may be injurious to him, makes a representation which he knows to be false, or which he does not believe to be true (*o*). The legal definition of fraud does not, however, include necessarily any degree of moral turpitude (*p*). There is fraud in law, if a man makes a representation which he knows to be false, or does not honestly believe to be true, and makes it with the view to induce another to act on the faith of it, who does so accordingly, and by so doing sustains damage, although he may have had no dishonest purpose in making the representation. It is immaterial that there may have been no intention on his part to benefit himself or to injure the person to whom the representation was made. It is enough that it be made wilfully and with the view to induce another to act upon it, who does so

(*l*) *Leddell v. Macdougall*, 29 W. R. 404; *Reese River Mining Co. v. Smith*, 4 E. & I. App. Ca. 79, per Lord Cairns; *Redgrave v. Hurd*, 20 Ch. D. 13, per Jessel, M. R.

(*m*) *Smout v. Ilbery*, 10 M. & W. 10.

(*n*) *Brownlie v. Campbell*, 5 App.

Ca. 953, per Lord Blackburn.

(*o*) *Taylor v. Ashworth*, 11 M. & W. 413; *Evans v. Edmonds*, 13 C. B. 786; *Thom v. Bigland*, 8 Exch. 725.

(*p*) 6 M. & W. 377; 10 M. & W. 155, per Lord Abinger.

accordingly to his prejudice. The law imputes to him a fraudulent intent, although he may not have been in fact instigated by a morally bad motive. An intention to deceive or a fraudulent intent in the legal acceptation of the term, depends upon the knowledge or belief respecting the falsehood of the statement and not upon the actual dishonesty of purpose in making the statement (*q*). Where, for instance, the defendant had accepted a bill of exchange in the name of the drawee, purporting to do so by procuration, knowing that in fact he had no such authority, but fully believing that the acceptance would be sanctioned and the bill paid by the drawee, and the drawee repudiated the acceptance, it was held, though the jury negatived a fraudulent intention in fact, that the defendant had committed a fraud in law by making a representation which he knew to be untrue, and which he intended others to act upon (*r*).

Though a misrepresentation be made with the motive and in the expectation of benefiting a person by his acting upon it, it may in law be fraudulent (*rr*).

The presence or absence of a corrupt motive or dishonest purpose distinguishes moral from legal fraud. A misrepresentation made without a corrupt motive or dishonest purpose is called legal fraud. If there be present a corrupt motive or dishonest purpose in making a misrepresentation, there is moral fraud (*s*).

In *Wilde v. Gibson* (*t*), a fraudulent intention was not imputed to a man by reason merely of his having constructive notice that a representation made by him was untrue, when he had no actual knowledge that it was untrue. "The effect of constructive notice," said Lord Cottenham (*u*), "in cases in which it is applicable, as in contests between

(*q*) *Foster v. Charles*, 7 Bing. 107 ;
Polhill v. Walter, 3 B. & Ad. 114 ;
Murray v. Mann, 2 Exch. 541, *per*
 Lord Wensleydale ; *Wilde v. Gibson*,
 1 H. L. 633, *per* Lord Campbell.

(*r*) *Polhill v. Walter*, 3 B. & Ad.
 114.

(*rr*) *Peck v. Gurney*, 13 Eq. 110

(*s*) *Moens v. Heyworth*, 10 M. &
 W. 157, *per* Lord Wensleydale ;
Wilde v. Gibson, 1 H. L. 633, *per*
 Lord Campbell ; but see *Weir v.*
Bell, 3 Exch. D. 243, *per* Lord Bram-
 well.

(*t*) 1 H. L. 605.

(*u*) *Ib.*, 623.

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Misrepresentation made by mistake.

equities of innocent parties, is sufficiently severe, and is only resorted to from the necessity of finding some ground of preference between equities otherwise equal, and cannot be applied in support of an imputation of direct personal fraud."

If a man makes a representation in the honest belief that it is true, and there be reasonable ground for such belief, a fraudulent intent will not be imputed to him, although it may turn out to be false (*v*), unless there be a duty cast on him to know the truth (*x*). A misrepresentation made through honest mistake is not a ground for rescinding a transaction (*y*), unless the subject matter be different in substance from what it was represented to be. In cases where a contract is sought to be rescinded on the ground of fraud, it is enough to show a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission, unless it be such as to show that there is a complete difference between what was represented and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought they were dealing about a sound horse, and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole of the price, unless there was a condition to that effect in the contract. The principle is well illustrated by the civil law as stated in the Digest (*z*). There, after laying down the general rule that where the parties are not at one as to the subject of the contract there is no agreement, and that this applies where the parties have mis-

(*v*) *Haycraft v. Creasy*, 2 East, 92; *Collins v. Evans*, 5 Q. B. 820; *Thom v. Bigland*, 8 Exch. 726.

(*x*) *Thom v. Bigland*, *ib.*, *infra*.

(*y*) *Ormrod v. Huth*, 14 M. & W. 651.

(*z*) Lib. 18, *De contrahenda emptione*, Tit. 1, leg. 9, 10, 11.

apprehended each other as to the *corpus*, as where an absent slave was sold, and the buyer thought he was buying Pamphilus, and the vendor thought he was selling Stichus; and pronouncing the judgment that in such a case there was no bargain because there was *error in corpore*, the framers of the Digest moot the point thus: "*Inde queritur si in ipso corpore non erretur sed in substantia error sit ut puta si acetum pro vino veneat, aes pro auro, vel quid aliud argento simile; an emptio et venditio sit;*" and the answers given by the great jurists quoted are to the effect that if there be a misapprehension as to the substance of the thing, there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. Paulus says, "*si aes pro auro veneat, non valet, aliter atque si aurum quidem fuerit, deterius autem quam emptor estimaret; tunc enim emptio valet*" (a).

The principle of our law is the same as that of the civil law. If the thing sold differs in substance from what the purchaser was led by the vendor to believe he was buying, there is no contract. In *Gompertz v. Bartlett* (b), and *Gurney v. Womersley* (c), a man who honestly sold what he thought was a bill without recourse to him, was held nevertheless bound to return the price, on its turning out that the supposed bill was void under the stamp laws in the one case, and was a forgery in the other (d). So also where cotton was sold by sample, and the sample was long stapled cotton, but the cotton delivered was short stapled cotton, the cotton was held to be different in kind from what the purchaser had contracted to buy, and that he was entitled to reject it (e). If, on the other hand, the purchaser receives what answers the description of the article sold, and there is no difference in substance between the article delivered and the article sold, but only a difference in some quality or accident, the contract remains binding in the

(a) *Kennedy v. Panama, &c., Co.*,
L. R. 2 Q. B. 587.

(b) 2 E. & B. 849.

(c) 4 E. & B. 133.

(d) See *Flight v. Booth*, 1 Bing.
N. C. 377.

(e) *Azemar v. Casella*, L. R. 2 C.
P. 677.

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absence of a warranty, even though a misapprehension caused by the incorrect representation of the vendor may have been the actuating motive to the purchaser (*f*). In such a case the rule *caveat emptor* will apply (*g*). In a case, accordingly, where a steam-packet company issued a prospectus stating in effect that they had entered into a contract with a colonial government for the carrying of mails between certain places, and a man induced by the terms of the prospectus applied for and obtained some of the shares, but the contract, not being binding on the colonial government, was repudiated, it was held that the representation did not affect the substance of the matter, the applicant having actually got shares in the very company, for shares in which he had applied, and the shares being a property of considerable value in the market, though perhaps not so valuable as they would have been had the statement in the prospectus been strictly accurate (*h*). The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only as to some point, even though a material point, an error as to which does not affect the substance of the whole consideration. There may be misapprehension as to that which is a material part of the motive inducing the transaction, but not so as to prevent the subject matter of the transaction from being in substance what it was represented to be (*i*).

The same principles apply in equity. A man who makes a representation which he honestly and upon reasonable grounds believes to be true, or believes himself entitled to assert, is not, independently of a duty cast on him to know the truth, bound in equity, if the representation turns out to be untrue, to make good what he has so represented (*k*). "There is no case in equity," said Lord Thurlow, in *Merewether*

(*f*) *Kennedy v. Panama, &c., Co.*, L. R. 2 Q. B. 580.
L. R. 2 Q. B. 587.

(*g*) *Ib.* 2 E. & B. 850, *per* Lord Campbell.

(*h*) *Kennedy v. Panama, &c., Co.*,

(*i*) *Ib.* 588.

(*k*) *Merewether v. Shaw*, 2 Cox, 134; *Ainslie v. Medlycott*, 9 Ves. 21; *Evans v. Wyatt*, 31 Beav. 217.

v. *Shaw* (l), "where a man making an honest representation when called upon to give an account of the circumstances of another, has been held liable in this respect to make good what he has so represented." From certain dicta to be found in the reports, it may appear doubtful whether the same principles apply in equity where a claim is made for the restitution of property acquired through incorrect representations made by honest mistake. In *Rawlins v. Wickham* (m), Turner, L. J., said that if, upon a treaty for purchase, one of the parties to the contract makes a representation materially affecting the subject matter of the contract, he cannot be allowed to retain any benefit which he has derived, if the representation proves to be untrue, and that no man can be held to what he has done under circumstances which have been erroneously represented to him by the other party to the transaction, however innocently the representation may have been made; that a contrary doctrine would strike at the root of fair dealing, and would open a door of escape in all cases of representation as to credit, and indeed in all other cases of false representation (n). The words of Mr. Justice Story, in *Daniel v. Mitchell* (nn), are much to the same effect. "Nothing," he said, "is clearer in equity than the doctrine that a bargain founded upon false representations made by the seller, although made by innocent mistake, will be avoided. Mistake as well as fraud in any representation of a fact material to the contract is a sufficient ground to set it aside" (o). There is, however, good reason to doubt whether on principle or authority, the equitable rule with respect to the restitution of property acquired through false representations can be carried so far as the words of these learned judges would warrant. In *Rawlins v. Wickham*, there was, in fact, a duty cast upon the party making the representation to know the truth, so that it is probable that the words of Turner, L. J., though general in terms, should be taken with reference to the particular circumstances of the case. The rule at law being

(l) 2 Cox, 134.

(m) 3 D. & J. 317.

(n) *Hart v. Swaine*, 7 Ch. D. 46.

(nn) 1 Story (Amer.), 172.

(o) *Hough v. Richardson*, 3 Story(Amer.), 691; *Doggett v. Emerson*,

ib. 733.

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reasonable and fully adequate for the purposes of justice, there is no reason for extending the rule in equity, so far as the words of Turner, L. J., would, if taken generally, warrant. There is no ground for contending that the rule *caveat emptor* does not apply in equity as well as at law (*p*), or that a representation amounts any more in equity to a warranty than it does at law. The sound doctrine would seem to be that the rule in equity is the same as the rule at law, and that if, accordingly, a representation be honestly and upon fair and reasonable grounds believed to be true by the party making it, and there be no duty cast on him to know the truth, no claim for the restitution of property acquired through the representation can be maintained in equity, although the representation proves to be untrue (*q*), unless the subject matter be so different in substance from what it was represented to be, as to amount to a failure of consideration (*r*).

There is a difference in substance amounting to a failure of consideration, if the property is not of the same nature or description as it was represented to be in the particulars of sale (*s*), as where leasehold or copyhold property is described as freehold (*t*); or where land sold and conveyed as freehold turns out to be copyhold (*u*); or, perhaps, where an under lease is sold as an original lease (*x*); or as where upon the sale of an estate let at lease on a rack-rent, such rent is described as a ground-rent (*y*); or where there is a misdescription of the quantity of land in regard to acres being statute acres or customary

(*p*) *Gorsuch v. Cree*, 29 L. J. C. P. Bolton, 8 Ch. 118.

(*q*) See *Legge v. Croker*, 1 Ba. & Be. 514; *Bartlett v. Salmon*, 6 D. M. & G. 33; *Brett v. Clowser*, 5 C. P. D. 376.

(*r*) See *Howland v. Norris*, 1 Cox, 59; *Leslie v. Tompson*, 9 Ha. 268; *Bartlett v. Salmon*, 6 D. M. & G. 41.

(*s*) See *Taylor v. Martindale*, 1 Y. & C. C. C. 658; *Mudeley v. Booth*, 2 Deg. & S. 722; *Stanton v. Tattersall*, 1 Sm. & G. 536; *Price v. Macaulay*, 2 D. M. & G. 346; *Torrance v. Bolton*, 8 Ch. 118.

(*t*) *Drewe v. Corp*, 9 Ves. 368; *Pulsford v. Richards*, 17 Beav. 96, per Lord Romilly.

(*u*) *Hart v. Swaine*, 7 Ch. D. 46.

(*x*) *Mudeley v. Booth*, 2 Deg. & S. 718; *Henderson v. Hudson*, 15 W. R. 860. See *Darlington v. Hamilton*, Kay, 550; but see *Camberwell, &c., Building Society v. Holloway*, 13 Ch. D. 754.

(*y*) *Stewart v. Alliston*, 1 Mer. 26. See *Bartlett v. Salmon*, 6 D. M. & G. 33.

acres (*z*) ; or where the acreage of an estate is very much less than it was represented to be (*a*) ; or as where a house composed externally partly of brick, and partly of timber, and lath and plaster, is described as a brick-built house (*b*) ; or where property which was in truth an equity of redemption in a reversionary interest was described as an absolute reversion, or as an immediate reversion expectant on the death of a tenant for life (*c*) ; or where the rents at which the different parts of a lot of land were stated, but no mention was made of a ground-rent (*d*).

So, also, there is a difference in substance amounting to a failure of consideration, if there be misrepresentation upon a point material to the due enjoyment of the property ; as where a vendor describes land as situated within one mile of a particular town, when it is, in fact, several miles distant therefrom (*e*) ; or where, upon the sale of a lease of a house or shop, the particulars merely stated that the lease contained a restriction against certain specified trades being carried on upon the premises, whereas, in fact, several other trades were forbidden (*f*) ; or where, upon the sale of a piece of land described as "a first-rate building plot of ground," no notice was taken of a right of way passing over it (*g*), or of an underground watercourse which third parties had liberty to open, cleanse, and repair, making satisfaction for damage thereby occasioned (*h*) ; or as where a house described to be situated in a fashionable street, was not actually in that street, but merely communicated with it by a passage (*i*).

(*z*) *Price v. North*, 2 Y. & C. 620 ;
Earl of Durham v. Legard, 34 Beav.
612.

(*a*) *Aberaman Iron Works v.*
Wilkins, 4 Ch. 101.

(*b*) *Powell v. Double*, Sug. V. &
P. 29, Dart, V. & P. 90.

(*c*) *Torrance v. Bolton*, 8 Ch. 124.

(*d*) *Jones v. Rimmer*, 14 Ch. D.
591.

(*e*) *Duke of Norfolk v. Wortley*, 1
Camp. 337 ; *Pulsford v. Richards*, 17
Beav. 96, *per* Lord Romilly.

(*f*) *Flight v. Booth*, 1 Bing. N. C.
370. See *Vignolles v. Brown*, 12 Ir.
Eq. 194, 196.

(*g*) *Dykes v. Blake*, 4 Bing. N. C.
463. See *Gibson v. D'Este*, 2 Y. &
C. C. C. 542.

(*h*) *Shackleton v. Sutcliffe*, 1 Deg.
& S. 609.

(*i*) *Stanton v. Tattersall*, 1 Sm. &
G. 529 ; *comp. White v. Bradshaw*,
16 Jur. 735. See Dart, V. & P. 88,
89.

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So, also, there is a difference in substance amounting to a failure of consideration, where the property, as described, is not identical with that intended to be sold (*k*); or where a material part of the property described has no existence, or cannot be found (*l*); or where no title can be shown to it, as where upon the sale of a leasehold house and small yard adjoining, the yard was not included in the lease, but was held from year to year at a separate rent (*m*); or where land was described in the particulars of sale as held under a lease that would expire on a certain day, but it turned out that the tenant of part of the land was entitled under an equitable title to a reversionary term for four lives (*n*); or where an annuity was granted to be calculated on a certain footing by the agent of the grantee, and the calculation proved very inaccurate (*o*); or where a man agreed to purchase a share in a partnership business, on the footing of a balance-sheet prepared by an accountant employed by the vendor, which turned out to be very inaccurate in certain particulars (*p*); or where there was a material variance between the prospectus of a company, on the basis of which a man took shares in the concern, and the memorandum of association by which it was governed (*q*); or where a man was released from an obligation, in which he was bound, on a representation that a certain security deposited with the creditor (which proved to be an imaginary one) was a good security (*r*).

So, also, it may be laid down, as a general rule, that there is a difference in substance amounting to a failure of consideration, if the misrepresentation or misdescription is of such a nature that the amount of compensation cannot be esti-

(*k*) *Leach v. Mullett*, 3 C. & P. 115.

(*l*) *Robinson v. Musgrove*, 2 Moo. & R. 92.

(*m*) *Dobell v. Hutchinson*, 3 A. & A. 355. See *Knatchbull v. Grueber*, 1 Madd. 153; *McCulloch v. Gregory*, 1 K. & J. 286.

(*n*) *Lincham v. Cotter*, 7 Ir. Eq. 177. See *Collier v. Jenkins*, You. 298; Sug. V. & P. 304.

(*o*) *Carpmael v. Powis*, 10 Beav. 44.

(*p*) *Charlesworth v. Jennings*, 34 Beav. 96.

(*q*) *Downes v. Ship*, 3 E. & I. App. Ca. 343; *Stewart's Case*, 1 Ch. 586; *Lawrence's Case*, 2 ib. 425; *Ship v. Crosskill*, 10 Eq. 82.

(*r*) *Scholfield v. Templer*, 4 D. & J. 434.

mated (s); as where on the sale of a reversion expectant on the decease of A. in case he should have no children, his age was described as sixty-six, instead of sixty-four (t); or as where on the sale of a wood, the particulars erroneously stated that the average size of the timber approached fifty feet, the number of trees not being stated (u); or as where the particulars stated the premises to be in the joint occupation of A. and B. as lessees, when in fact A. was only assignee of the lease, and B. was a mere joint occupier (x); or as where the right to coal under the estate was shown to be in other parties, and no means existed of determining its value (y).

The presence of the words "more or less" in a contract for the sale of a deed of conveyance of land after a statement of the quantity of acres comprised therein does not import a special engagement that the purchaser takes the risk of the quantity. The words must be taken merely to cover a reasonable excess or deficiency. If it turn out that the quantity falls considerably short of what it was represented to be, the court will relieve the purchaser from payment for the deficiency; but a slight variation does not afford a ground for relief (z). Nor will the court interfere, although the deficiency be considerable, if the risk as to the quantity constituted one of the elements of the agreement, or if the sale was of a thing in gross and not by admeasurement (a), or if there was a special stipulation that the quantities shall be taken as stated (b). But if the acreage of an estate is very much less than it was represented to be, a proviso in one of the articles of sale that the

Words "more or less" after statement of quantity of acres, &c.

(s) See *Madeley v. Booth*, 2 Deg. & S. 722.

(t) *Sherwood v. Robins*, Moo. & M. 194. See 8 Cl. & F. 792.

(u) *Lord Brooke v. Roundthwaite*, 5 Ha. 298.

(x) *Ridgway v. Gray*, 1 Mac. & G. 109. See *Grissell v. Peto*, 2 Sm. & G. 39.

(y) *Smithson v. Powell*, 20 L. T. 105.

(z) *Hill v. Buckley*, 17 Ves. 398; *Winch v. Winchester*, 1 V. & B. 375;

Portman v. Mill, 2 Russ. 570, Sug. V. & P. 324. See *Charlesworth v. Jennings*, 34 Beav. 96; *Davis v. Shepherd*, 1 Ch. 410.

(a) *Anon.*, 2 Freem. 107; *Tryford v. Wareup*, Finch. 310; *Baxendale v. Seale*, 19 Beav. 661. See *Leslie v. Thompson*, 9 Ha. 268.

(b) *Nicoll v. Chambers*, 11 C. B. 996. See Sug. V. & P. 324 327; *Cordingley v. Cheesborough*, 3 Giff. 506, 4 D. F. & J. 379.

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estate as to extent should be taken to be conclusively shown by certain deeds, will not estop the purchaser from having the contract rescinded on the ground of the deficiency (c). A condition of sale providing that if any error, misstatement, or omission in the particulars should be discovered, it should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof, applies only to small errors, and will not cover a large deficiency (d).

Duty to disclose the truth on discovery that a representation was false.

Though a party making a representation may at the time believe it to be true, and have made it innocently, yet if after discovering that it was untrue he suffers the other party to continue in error and to act on the belief that no mistake has been made, this from the time of the discovery becomes in the contemplation of a court of equity a fraudulent misrepresentation, even though not so originally (e). If, moreover, a man makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party who made the representation, but not to the knowledge of the party to whom the representation was made, and are so altered that the alteration may affect the course of conduct which may be pursued by the party to whom the representation was made, it is the duty of the party who has made the representation to communicate to the party to whom he made it the alteration of those circumstances. The party to whom the representation has been made will not be held bound in equity, unless such a communication has been made (ee). Thus, where a man for the purpose of insuring his life, signed a declaration that he was in good health, but before the policy was completed he consulted a physician, who told him that he was in a dangerous state of health; it was held that the non-communication to the company of his change in health was fraudulent, and vitiated the policy (f). So also where an

(c) *Aberaman Iron Works v. Wickens*, 4 Ch. 101.

(d) *Whittemore v. Whittemore*, 8 Eq. 603.

(e) *Reynell v. Sprye*, 1 D. M. & G. 660, 709; *Davies v. London & Provincial Marine Insurance Co.*, 8 Ch.

D. 474.

(ee) *Traill v. Baring*, 4 D. J. & S. 329; *Davies v. London & Provincial Marine Insurance Co.*, 8 Ch. D. 474.

(f) *British Equitable Insurance Co. v. Great Western Railway Co.*, 38 L. J. Ch. 314.

insurance company proposed to another office a re-insurance on a life, representing as was then the fact, that they retained a large portion of the risk, but before the re-insurance was carried into effect, they got rid of the whole of the risk on the life by re-insurance with a third office without communicating that fact to the other office, it was held that the insurance was obtained by fraud, and must be cancelled (*g*).

On the other hand, a representation that was false at the time it was made may, by a change of circumstances, become a true representation at the time it is acted on. As where a company issued a prospectus, representing that more than half the capital had been subscribed, whereby a man was induced to apply for shares, and the representation was not true at the time when the prospectus was issued, but it had become true at the time of his application; it was held that there was no misrepresentation entitling him to relief (*h*).

In considering whether a man has reasonable grounds for believing a representation to be true, the position in which he is placed, and the sources from which he has drawn his information, must be taken into consideration (*i*). If a man be asked to give an account as to the fortune or circumstances of another, statements appearing in wills, deeds, marriage settlements, &c., are reasonable sources of information. He cannot be called on if the statements therein appearing turn out to be incorrect, to make good his representation (*k*). The alleged *bonâ fide* belief in an untrue statement can be tested only by considering the grounds of such belief, and if an untrue statement is made founded upon a belief destitute of all reasonable grounds, or which the least inquiry would immediately correct, it may fairly be characterised as misrepresentation and deceit (*l*). If persons make statements which they may *bonâ fide* believe to be true, but which, if they had used a little more care and caution they

Reasonable ground for believing a representation to be true.

(*g*) *Traill v. Baring*, 4 D. J & S. 318.

(*h*) *Ship v. Crosskill*, 10 Eq. 73.

(*i*) *Cullen's Trustee v. Johnston*, 3 Dec. of Court of Session, 3rd series, p. 936.

(*k*) *Ainslie v. Medlycott*, 9 Ves. 21; *Evans v. Wyatt*, 31 Beav. 217.

(*l*) *Western Bank of Scotland v. Addie*, 1 Sc. App. Ca. 162, per Lord Chelmsford.

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must have seen were not true, there is evidence to show that they did not really believe in the truth of what they said (*m*). A man must examine into the truth of representations made to him by others, before putting them forward as true, or as of his own knowledge. He cannot be allowed to escape from the effect of positive representations of matters of fact upon the ground that he relied upon representations made to him by an agent employed by him for the purpose of getting information for him. If a man makes a representation in such a manner as to import a knowledge of the facts to which the representation refers, and the representation is not materially qualified by a reference to any other person as the source of information, he cannot be heard to say, on a claim for the rescission of the transaction, if the representation proves to be untrue, that he made the representation on the authority of his agent, and honestly believed it to be true. If a company give credit to, and assume as true the reports which are made to them by their agents, and represent as facts the matters stated in those reports, and persons are induced to enter into contracts on the foundations of the assumption of the representations which have been made to them, they cannot be heard to say, on a claim for a rescission of the transaction, if the representations prove to be untrue, that they honestly believed them to be true. If the company, instead of stating a thing as a fact, state merely that they have received reports from their agents, and that they have reason to believe the reports to be true, the case may be different (*n*). It may be material, where proceedings at law are aimed against a man with a view to obtain damages from him personally for false representation, that he may have believed statements made to him by agents to be true, but it is immaterial where the transaction is sought to be set aside (*o*).

(*m*) *Ib.* 168, *Cranworth*.

(*n*) *Smith's Case, Re Reese River Silver Mining Co.*, 2 Ch. 604, 611, 615; *Ross v. Estates Investment Co.*, 3 Eq. 138, 3 Ch. 682; *Henderson v. Lacon*, 5 Eq. 261; *Att'y.-Genl. v.*

Ray, 9 Ch. 405; *Cooper v. Lovering*, 10 Browne (Amer.), 78; *Fisher v. Mellen*, 7 Browne (Amer.), 506.

(*o*) *Smith's Case, Re Reese River Silver Mining Co.*, 2 Ch. 615; *Henderson v. Lacon*, 5 Eq. 261.

A misrepresentation, however, is a fraud at law, although made innocently, and with an honest belief in its truth, if it be made by a man who ought in the due discharge of his duty to have known the truth, or who formerly knew, and ought to have remembered, the fact which negatives the representation, and be made under such circumstances or in such a way as to induce a reasonable man to believe that it was true, and was meant to be acted on, and has been acted on by him accordingly to his prejudice. If a duty is cast upon a man to know the truth, and he makes a representation in such a way as to induce a reasonable man to believe that it is true, and is meant to be acted on, he cannot be heard to say, if the representation proves to be untrue, that he believed it to be true, and made the misstatement through mistake, or ignorance, or forgetfulness (*p*). Where accordingly the trustee of a fund represented to a proposed assignee that the assignor was entitled to the fund and could make the assignment, forgetting that there was a prior incumbrance upon it, of which he had received notice, he was held bound to make good the representation (*q*). So also where a man wrote a letter stating that he was willing to grant a lease, knowing that it was to be shown to a person proposing to lend money to the lessee upon the security of the lease, and it appeared that he had before granted a concurrent lease of the same property which he alleged that he had forgotten, he was held responsible for his statement and for the repayment of the loan made on the faith of it (*r*).

Misrepresentation by a man upon whom a duty is cast to know the truth.

The rule established in *Collen v. Wright* (*s*) that if a man,

Misrepresentation of authority.

(*p*) *Burrowes v. Lock*, 10 Ves. 470; *Moens v. Heyworth*, 10 M. & W. 147; *Pulsford v. Richards*, 17 Beav. 95; *Ayre's Case*, 25 Beav. 522; *Price v. Macaulay*, 2 D. M. & G. 345; *Hutton v. Rossiter*, 7 D. M. & G. 9; *Rawlins v. Wickham*, 3 D. & J. 304; *Swan v. North British Australasian Co.*, 2 H. & C. 183; *Henderson v. Lacon*, 5 Eq. 262; *Brownlie v. Campbell*, 5 App. Ca. 936; comp. *Merewether v. Shaw*, 2 Cox, 134,

where a brother made, through misconception, a false representation respecting his sister's fortune to a man who was about to marry her, and did afterwards marry her. See also *Ainslie v. Medlycott*, 9 Ves. 21; *Evans v. Fowler*, 21 Beav. 217.

(*q*) *Burrowes v. Lock*, 10 Ves. 70.

(*r*) *Slim v. Croucher*, 1 D. F. & J. 518.

(*s*) 8 E. & B. 647.

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however honestly, assumes to act as agent for another in respect of a matter over which he has no authority, and induces another thereby to make a contract, he must be taken in law to promise that he is what he represents himself to be, and must answer for any damage which directly results from confidence being given to his representations, is not an exception to the general rule of law that no action is maintainable for a mere statement, although untrue and although acted on to the damage of the person to whom it is made, unless the statement is false to the knowledge of the person making it. The principle of that decision is that when a man, either expressly or by his conduct, invites another to negotiate with him upon the assertion that he is filling a certain character, and a contract is entered into upon that footing, he is liable to an action, if he does not fill that character, but the liability arises not from the misrepresentation alone, but from the invitation to act and from the acting in consequence of that invitation (*t*).

Distinction
between a war-
ranty and a
representation.

A statement which amounts to a warranty, must be distinguished from a statement which amounts merely to a representation. A representation is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstance relating to it (*u*). A representation is not a part of the written instrument, but is collateral to it, and entirely independent of it (*v*). The insertion of the representation in the instrument does not alter its nature. Though a representation is sometimes contained in a written instrument, it is not an integral part of the contract, and consequently the contract is not broken, though the representation proves to be untrue (*x*). In order that a statement or representation may amount to a warranty, it must appear that it was intended to form a substantive part of the contract (*y*). A

(*t*) See *Dickson v. Reuter's Telegram Co.*, 3 C. P. D. 7.

(*u*) *Behn v. Burness*, 3 B. & S. 753.

(*v*) *Goram v. Sweeting*, 2 Wms. Saund. 201. See *Kain v. Old*, 2 B. & C. 634, *per* Lord Tenterden; *Corn-*

foot v. Fowke, 6 M. & W. 370, *per* Lord Cranworth.

(*x*) *Behn v. Burness*, 3 B. & S. 753.

(*y*) *Behn v. Burness*, 3 B. & S. 754.

warranty is an express or implied statement of something which the party making it undertakes shall be a substantive part of the contract, and though part of the contract, yet collateral to the express object of it (*z*). A representation of intention does not amount to a warranty (*a*). If a representation or statement is not of the essence of the contract, there is no warranty (*b*). The circumstance of a man selling a particular thing by its proper description is not a warranty that the thing is of that description. If the thing does not answer the description, there is not a breach of warranty, but a non-compliance with a contract which he has engaged to fulfil (*c*). To constitute a warranty, it is not necessary that the word "warrant" should occur in the bargain (*d*). Any affirmance or representation made at the time of sale is a warranty if it appears to have been so intended and understood by the parties (*e*). Nor is it necessary that the statement or representation should be simultaneous with the close of the bargain. If it be part of the contract, it matters not at what period of the negotiation it was made (*f*). If a statement amounts to a warranty, the party making it is bound by his warranty. The fact that he may have made the statement in honest mistake, or that the statement may be not in a material matter, cannot be taken into consideration (*g*).

The term "warranty" is used in two senses. It is either a condition on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract altogether,

(*z*) *Chanter v. Hopkins*, 4 M. & W. 404, *per* Lord Abinger; *Stucley v. Bailly*, 1 H. & C. 415, *per* Martin, B.

(*a*) *Benham v. United Guarantee, &c., Assurance Co.*, 7 Exch. 744.

(*b*) *Cranston v. Marshall*, 5 Exch. 402; *Taylor v. Bullen*, *ib.* 779; *Vernede v. Weber*, 1 H. & N. 311.

(*c*) *Chanter v. Hopkins*, 4 M. & W. 404, *per* Lord Abinger; *Stucley v. Bailly*, 1 H. & C. 415, *per* Martin, B.

(*d*) *Hopkins v. Tanqueray*, 15 C. B. 137, *per* Jervis, C. J.; *Stucley v.*

Bailly, 1 H. & C. 417.

(*e*) *Pasley v. Freeman*, 3 T. R. 57, *per* Buller, J.; *Stucley v. Bailly*, 1 H. & C. 405.

(*f*) *Hopkins v. Tanqueray*, 15 C. B. 137, *per* Jervis, C. J.

(*g*) *Attwood v. Small*, 6 Cl. & Fin. 232; *Anderson v. Fitzgerald*, 4 H. L. 504, *per* Lord Cranworth; *Bun-nerman v. White*, 10 C. B. N. S. 844; *Behn v. Burness*, 3 B. & S. 754, 759; *Head v. Tattersall*, L. R. 7 Exch. 11.

and so be released from performing his part of it, or it is an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for compensation in damages. The question whether a statement, though intended to be a substantive part of the contract, is a condition precedent, or an independent agreement, is sometimes raised in the construction of charter-parties, with reference to stipulations that some future thing shall be done or shall happen, and has given rise to very nice distinctions. Thus a statement that a vessel is to sail, or be made ready to receive a cargo, on or before a given day, has been held to be a condition, while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement (*h*). If the statement be a condition, and it be not complied with, the party to whom it is made may, if he be so minded, repudiate the contract, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty ceases to be available as a condition, and becomes a warranty in the narrower sense of the term, that is to say, a stipulation by way of agreement, for the breach of which a compensation may be sought in damages. Accordingly, if a specific thing has been sold, with a warranty of its quality, under such circumstance that the property passes by the sale, the vendee having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken (unless there is a special condition to that effect in the contract), but must have recourse to an action for damages in respect of the breach of warranty. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed. Still, if he receives the thing

(*h*) *Behn v. Burness*, 3 B. & S. 754.

as sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action for damages (*i*).

Affirmations in policies of insurance are in the nature of warranties. In the case of policies of marine insurance, and policies against fire, a warranty is also a condition. It is an implied condition of the validity of the policy, that the party proposing the insurance should make a true and complete representation respecting the property which he seeks to insure. Such policies are therefore vitiated by any material misrepresentations, even though not fraudulently made (*k*). In the case of life assurances, however, it is not an implied condition of the validity of the policy that the party proposing the insurance should make a true and complete representation respecting the life proposed for insurance. If there be no express warranty or condition on the part of the insured, a policy of life assurance is not vitiated by false representations, unless there be fraud (*l*). If there be a proviso in a policy of assurance, that any untrue statements shall avoid the policy, the policy is vitiated by any statement false in fact, whether material or not (*m*). The same principle applies to the purchase of government annuities on lives in which the information required by the Act forms the basis of the grant of the annuity, and accordingly an annuity applied for and granted under a misrepresentation, though unintentional, in the information required as to the age of a person, was set aside after his death (*n*).

(*i*) *Behn v. Burness*, 3 B. & S. 490.
755.

(*k*) *Curter v. Boehm*, 3 Burr. 1905;
Moens v. Heyworth, 10 M. & W. 157,
per Lord Wensleydale; *Anderson v.*
Fitzgerald, 4 H. L. 484; *Sillem v.*
Thornton, 3 E. & B. 868; *Stokes v.*
Coz, 1 H. & N. 533; *Bannerman v.*
White, 10 C. B. N. S. 860; *Ionides*
v. Pacific Insurance Co., L. R. 6 Q.
B. 674, 7 Q. B. 520. See *Re Uni-*
versal & Fire Insurance Co., 19 Eq.

(*l*) *Whelton v. Hardisty*, 8 E. &
B. 232, *infra*.

(*m*) *Anderson v. Fitzgerald*, 4 H.
L. 484; *Cazenove v. British Equitable*
Assurance Co., 6 C. B. N. S. 437;
Macdonald v. Law Union & Life
Insurance Co., L. R. 9 Q. B. 328;
London Assurance Co. v. Mansel, 11
Ch. D. 367; comp. *Perrins v. Marine,*
&c., Insurance Co., 2 El. & El. 317.

(*n*) *Atty.-Genl. v. Ray*, 9 Ch. 397.

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Misrepresentation must be material and a determining ground of the transaction.

In order that a misrepresentation may support an action, it is essential that it should be material in its nature (*o*), and should be a determining ground of the transaction (*p*). The misrepresentation must, in the language of the Roman law, be *dolus dans locum contractui* (*q*). There must be the assertion of a fact on which the person entering into the transaction relied, and in the absence of which it is reasonable to infer that he would not have entered into it at all (*r*), or at least not on the same terms (*s*). Both facts must concur; there must be false and material representations, and the party seeking relief should have acted upon the faith and credit of such representations (*t*). To say that statements are false is one thing; to say that a man was deceived by them to enter into a transaction is another thing (*u*). A misrepresentation to be material must be one necessarily influencing and inducing the transaction (*x*), and affecting and going to its very essence and substance (*y*).

(*o*) *Jennings v. Broughton*, 5 D. M. & G. 126. See *Gulles v. Pennington*, 5 Dow. 159.

(*p*) *Merewether v. Sharr*, 2 Cox, 134; *De Manneville v. Crompton*, 1 V. & B. 354; *Jameson v. Stein*, 21 Beav. 9; *Robson v. Earl of Deron*, 4 Jur. N. S. 245, 248; *Goldicutt v. Townsend*, 28 Beav. 445; *Jennings v. Broughton*, 5 D. M. & G. 136; *Denne v. Light*, 8 D. M. & G. 774.

(*q*) Fraud is divided by the civilians into *dolus dans locum contractui* and *dolus incidens*, or accidental fraud. The former is that which has been the cause or determining motive of the transaction; that, in other words, without which the party defrauded would not have contracted. Incidental or accidental fraud is that by which a man, otherwise intending to contract, is deceived as to some accessory or accident of the contract; for example, as to the quality of the object of sale or its price. The determination of the question as to the character of

the *dolus* rests in each particular case with the court. Accidental or incidental fraud is not a ground for avoiding a transaction, but simply subjects the party to an action for damages, *Duranton*, vol. 10, liv. 3, s. 169; *Toull. Dr. Civ.*, liv. 3, tit. 3, c. 2, s. 5, art. 90; *Bedarride*, sur *Dol*. p. 45. This distinction does not obtain in the common law, and is not admitted in equity.

(*r*) *Flight v. Booth*, 1 Bing. N. C. 370; *Pulsford v. Richards*, 17 Beav. 87, 96; *Eaglesfield v. Lord Londonderry*, 4 Ch. D. 709.

(*s*) 6 M. & W. 378, *per* Lord Abinger. See *Small v. Attwood*, You. 461.

(*t*) *Cargill v. Bower*, 10 Ch. D. 517.

(*u*) *Jennings v. Broughton*, 5 D. M. & G. 126.

(*x*) *Re Reese River Silver Mining Co.*; *Smith's Case*, 2 Ch. 611.

(*y*) *Hallows v. Fernie*, 3 Eq. 536; 3 Ch. 467.

Misrepresentations which are of such a nature as, if true, to add substantially to the value of property (*z*), or are calculated to increase substantially its apparent value (*a*), are material. A misrepresentation goes for nothing unless it is a proximate and immediate cause of the transaction (*b*). It is not enough that it may have remotely or indirectly contributed to the transaction or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place. The transaction must be a necessary and not merely an indirect result of the representation (*c*). It is not however necessary that the representation should have been the sole cause of the transaction. It is enough that it may have constituted a material inducement. If any one of several statements, all in their nature more or less capable of leading the party to whom they are addressed to adopt a particular line of conduct, be untrue, the whole transaction is considered as having been fraudulently obtained, for it is impossible to say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed (*d*). A man who has made a false representation in respect of a material matter must, in order to be able to rely on the defence that the transaction was not entered into on the faith of the representation, be able to prove to demonstration that it was not relied on (*e*).

(*z*) *Price v. Macaulay*, 2 D. M. & G. 344; *Jennings v. Broughton*, 5 D. M. & G. 126; *Torrance v. Bolton*, 8 Ch. 118.

(*a*) *Small v. Attwood*, You. 461; *Dimmock v. Hallett*, 2 Ch. 27.

(*b*) *Barry v. Crosskey*, 2 J. & H. 1; *New Brunswick, &c., Railway Co. v. Conybeare*, 9 H. L. 711; *Barrett's Case*, 3 D. J. & S. 30; *Peck v. Gurney*, 6 E. & I. App. Ca. 412.

(*c*) *Burnes v. Pennell*, 2 H. L. 497, 531; *Nicoll's Case*, 3 D. & J. 387, 439; *Barry v. Crosskey*, 2 J. & H. 1; *New Brunswick, &c., Railway Co. v. Conybeare*, 9 H. L. 711. See *Att-*

wood v. Small, 6 Cl. & Fin. 232, 447; *Jameson v. Stein*, 21 Beav. 5; *Robson v. Earl of Devon*, 4 Jur. N. S. 245; *Wheelton v. Hardisty*, 8 E. & B. 232; *Smith v. Kay*, 7 H. L. 750, 775.

(*d*) *Reynell v. Sprye*, 1 D. M. & G. 708; *Jennings v. Broughton*, 5 D. M. & G. 126; *Clarke v. Dickson*, 6 C. B. N. S. 453; *Smith v. Kay*, 7 H. L. 750, 775.

(*e*) *Rawlings v. Wickham*, 3 D. & J. 304; *Nicoll's Case*, ib. 387; *Smith v. Kay*, 7 H. L. 750, 775; *Kisch v. Central Venezuela Railway Co.*, 3 D. J. & S. 122.

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It is not enough for him to say that there were other representations by which the transaction may have been induced (*f*) ; nor can he be heard to say what the other party would have done, had no misrepresentation been made (*ff*).

Words, moreover, it must be remembered, are to be construed in courts of justice in the sense in which the person using them wished and believed that they should be understood by the person to whom they were addressed (*g*), and representations must be construed with reference to the circumstances present to the minds of all the parties when they were made (*h*).

The materiality of a representation depends on the circumstances. The following cases may be cited as examples :—

Upon an insurance office effecting a re-insurance of a risk with another office, the representation that they retained themselves a substantial share in the risk was held to be material, and the non-disclosure that they had in fact got rid of all risk vitiated the re-insurance (*i*). “The representation,” said Knight-Bruce, L. J. (*j*), was an important inducement to the company to accept the insurance without more inquiry than was made, and they were entitled to assert and to be believed in asserting, that they would not have acted as they have done if they had known the real facts.” So also a representation respecting a person’s credit, that he was possessed of a certain amount of capital, without stating that it was borrowed capital and not his own, was held to be a material misrepresentation to a person thereby induced to trust him (*k*). So also on a sale of goods for ready money, if the purchaser gives a cheque which he knows he has no funds to meet, this amounts to a misrepresentation of a material fact, which vitiates the sale, and entitles the seller to rescind the contract (*l*). Where, on the other hand, upon the negotiation for a loan of money, the lenders repre-

(*f*) *Nicoll’s Case*, 3 D. & J. 387, 439.

(*ff*) *Reynell v. Sprye*, 1 D. M. & G. 660 ; *Smith v. Kay*, 7 H. L. 750, 770 ; *Traill v. Baring*, 4 D. J. & S. 330.

(*g*) *Pigott v. Stratton*, 1 D. F. & J. 50, *per* Lord Campbell.

(*h*) *Dicconson v. Talbot*, 6 Ch. 40, *per* Mellish, L. J.

(*i*) *Traill v. Baring*, 4 D. J. & S. 318.

(*j*) *Ib.* 326.

(*k*) *Corbett v. Brown*, 8 Bing. 33.

(*l*) *Loughnan v. Barry*, I. R. 6 C. L. 457.

sented that it was lent by a joint-stock loan company, but it was in fact lent by themselves only, who called themselves the company, which did not otherwise exist, the misrepresentation was held to be immaterial, the real inducement to the borrower being the advance of the money (*m*). So also when upon negotiating the sale of some property the seller represented himself to be acting as agent for another, when in fact he was dealing on his own behalf, it was held under the circumstances to be immaterial, as it was not shown to have induced or affected the sale, and the buyer was held bound to specific performance (*n*). So also where a buyer, in negotiating a purchase, alleged falsely as the reason for the limited amount of his offer that his partners would not consent to his giving more, it was held to be immaterial to the validity of the contract (*o*).

A misrepresentation to be of any avail whatever must enure to the date of the transaction in question (*p*). If a man to whom a representation has been made knows at the time or discovers before entering into a transaction that the representation is false (*q*), or resorts to other means of knowledge open to him, and chooses to judge for himself in the matter, he cannot avail himself of the fact that there has been misrepresentation, or say that he has acted on the faith of the representation (*r*). Where accordingly an iron company had sent some of their directors for the express purpose of verifying the representations of a man respecting his works, who expressed their satisfaction with the proofs produced, it was held that the company had, by choosing to judge for themselves in the matter, precluded themselves from being able to say that they had been deceived by the representations of the vendor, and that it was their own fault if they had not availed themselves of all the

Reliance on the representation.

(*m*) *Green v. Gosden*, 3 M. & G. 446.

(*n*) *Fellowes v. Gwydyr*, 1 R. & M. 83.

(*o*) *Vernon v. Keys*, 12 East, 632.

(*p*) *Irvine v. Kirkpatrick*, 7 Bell, Sc. Ap. 186.

(*q*) 1b.; *Vigers v. Pike*, 8 Cl. &

Fin. 650; *Lord Brooke v. Roundthwaite*, 5 Ha. 298, 306; *Nelson v. Stocker*, 4 D. & J. 465.

(*r*) *Lysney v. Selby*, 2 Lord Raymond, 1118, 1120; *Pike v. Vigers*, 2 Dr. & Wal. 261; *Clarke v. Macintosh*, 4 Giff. 134. See *Farebrother v. Gibson*, 1 D. & J. 602.

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knowledge or means of knowledge open to them (*s*). So also where a man had before purchasing shares in a mine, visited the mine and examined into its condition, it was held that he had not relied on representations made to him by the vendor, and was not entitled to avoid the contract on the ground that they were false, the alleged misstatements being such as he was competent to detect (*t*). “Cases,” said Lord Langdale, in *Clapham v. Shilleto* (*u*), “frequently occur in which, upon entering into contracts, misrepresentations made by one party have not been in any degree relied on by the other. If the party to whom the representations were made himself resorted to the proper means of verification before entering into the contract, it may appear that he relied on the results of his own investigation and inquiry and not upon the representations made to him by the other party (*x*); or if the means of investigation and verification be at hand, and the attention of the party receiving the representation be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representation made to him may be excluded (*y*). Again, when we are endeavouring to ascertain what reliance has been placed on representations, we must consider them with reference to the subject matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate

(*s*) *Attwood v. Small*, 6 Cl. & Fin. 232. See *Redgrave v. Hurd*, 20 Ch. D. 16.

(*t*) *Jennings v. Broughton*, 17 Beav. 234, 5 D. M. & G. 126. See *Lowndes v. Lane*, 2 Cox, 363; *Vigers v. Pike*, 8 Cl. & Fin. 562, 650; *Robson v. Lord Decon*, 4 Jur. N. S. 245; *Haywood v. Cope*, 25 Beav. 148; *Nelson v. Stocker*, 4 D. & J. 465; *New Brunswick, &c., Railway Co. v. Conybeare*, 9 H. L. 711, 730.

(*u*) 7 Beav. 149.

(*x*) See *Lowndes v. Lane*, 2 Cox.

363; *Pickering v. Dowson*, 4 Taunt. 779; *Attwood v. Small*, 6 Cl. & Fin. 232; *Jennings v. Broughton*, 17 Beav. 234, 5 D. M. & G. 126; *Haywood v. Cope*, 25 Beav. 140.

(*y*) See *Lowndes v. Lane*, 2 Cox, 363; *Jennings v. Broughton*, 17 Beav. 234, 5 D. M. & G. 126; *Farebrother v. Gibson*, 1 D. & J. 602; *Clarke v. Macintosh*, 4 Giff. 143; *New Brunswick, &c., Railway Co. v. Conybeare*, 9 H. L. 711; *Hallows v. Fernie*, 3 Ch. 472.

knowledge, and the other is entirely ignorant or has not equal means of knowledge, and a contract is entered into after representations made by the party who knows or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made to him by him who was supposed to be better informed (*z*); but if the subject is in its nature uncertain, if all that is known is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, it is not easy to presume that the representations made by the one would have much or any influence on the other" (*a*).

The allegation of misrepresentation may be effectually met by proof that the party complaining was well aware and cognizant of the real facts of the case (*b*); but the proof of knowledge must be clear and conclusive. Misrepresentation is not to be got rid of by constructive notice (*c*). A man who by misrepresentation or concealment has misled another cannot be heard to say that he might have known the truth by proper inquiry, but must, in order to be able to rely on the defence that he knew the representation to be untrue, be able to establish the fact upon incontestible evidence and beyond the possibility of a doubt (*d*). "If a person," said Jessel, M.R., in

(*z*) See *Lysney v. Selby*, 2 Lord Raym. 1118—1120; *Lowndes v. Lane*, 2 Cox, 363; *Edwards v. McCleay*, 2 Sw. 289; *Vernon v. Keys*, 12 East, 637, 4 Taunt. 488; *Martin v. Cotter*, 3 J. & L. 506; *Reynell v. Sprye*, 1 D. M. & G. 660; *Price v. Macanlay*, 2 D. M. & G. 339; *Raackings v. Wickham*, 3 D. & J. 304; *Higgins v. Samels*, 2 J. & H. 460.

(*a*) See *Lowndes v. Lane*, 2 Cox, 363; *Harris v. Kemble*, 1 Sim. 111, 5 Bligh, 730; *Attwood v. Small*, 6 Cl. & Fin. 232; *Knight v. Marjoribanks*, 2 H. & Tw. 316; *Jennings v. Broughton*, 17 Beav. 234, 5 D. M. &

G. 126; *Haywood v. Cope*, 25 Beav. 140; *Clarke v. Macintosh*, 4 Giff. 143; *National Exchange Co. v. Drew*, 23 Dec. of Ct. of Session, 2nd series, p. 1.

(*b*) See *Eaglesfield v. Lord Londonderry*, 4 Ch. D. 709.

(*c*) *Jones v. Rimmer*, 14 Ch. D. 590, per Jessel, M. R.

(*d*) *Dyer v. Hargrave*, 10 Ves. 505; *Harris v. Kemble*, 5 Bligh, 730; *Vigers v. Pike*, 8 Cl. & Fin. 562, 650; *Wilson v. Short*, 6 Ha. 366, 375; *Shuckleton v. Sutcliffe*, 1 Deg. & S. 609; *Martin v. Cotter*, 3 J. & L. 496, 506; *Reynell v. Sprye*, 8 Ha.

Redgrave v. Hurd (e), "makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the party to whom the representation was made does not prove that he entered into the contract, relying upon the representation. If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it; and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms or showed clearly by his conduct that he did not rely on the representation."

If the subject matter is not property in this country, where probably independent inquiry would be made and inspection might take place, but property at such a distance that any person purchasing it is obliged to rely on the statement made with respect to it, the argument is the stronger that reliance has been placed on the representations (f). If a definite or particular statement be made as to the contents of property, and the statement be untrue, it is not enough that the party to whom the representation was made may have been acquainted with the property. A very intimate knowledge with the premises will not necessarily imply knowledge of their exact contents, while the particularity of the statement will naturally convey the notion of exact admeasurement (g). The fact that he had the means of knowing or of obtaining information of the truth which he did not use is not sufficient (h). It is not indeed enough that he may have been wanting in caution. A man who has made false representations, by which he has in-

257; *Price v. Macaulay*, 2 D. M. & Q. 339; *Kisch v. Central Venezuela Railway Co.*, 3 D. J. & S. 122; *Central Railway of Venezuela Co. v. Kisch*, 2 E. & I. App. Ca. 114; *Lawrence's Case*, 2 Ch. 422. See *Nelson v. Stocker*, 4 D. & J. 465.

(e) 20 Ch. D. 21.

(f) *Smith's Case*; *Re Reese Rice*

Silver Mining Co., 2 Ch. 614.

(g) *Hill v. Buckley*, 17 Ves. 394. See *King v. Wilson*, 6 Beav. 124.

(h) *Lysney v. Selby*, 2 Lord Raym. 1118, 1120; *Dobell v. Stevens*, 3 B. & C. 623; *Rawlins v. Wickham*, 3 D. & J. 319; *Aberaman Iron Works v. Wickens*, 4 Ch. 101.

duced another to enter into a transaction, cannot turn round on the person whom he has defrauded and say that he ought to have been more prudent and ought not to have concluded the representations to be true in the sense which the language used naturally and fairly imports (*i*). Nor is it enough that there may be circumstances in the case which, in the absence of the representation, might have been sufficient to put him on inquiry. The doctrine of notice has no application where a distinct representation has been made. A man to whom a particular and distinct representation has been made is entitled to rely on the representation and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn (*k*). He is not bound to inquire unless something has happened to excite suspicion (*l*), or unless there is something in the case or in the terms of the representation to put him on inquiry (*m*). The party who has made the representation cannot be allowed to say that he told him where further information was to be got, or recommended him to take advice, and even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other. No man can complain that another has relied too implicitly on the truth of what he himself stated (*n*). If a vendor has stated in his proposals the

(*i*) *New Brunswick, &c., Railway Co. v. Mugeridge*, 1 Dr. & Sm. 382 ; *Langham v. East Wheal, &c., Mining Co.*, 37 L. J. Ch. 254.

(*k*) *Grant v. Munt, Coop.* 173 ; *Van v. Corpe*, 3 M. & K. 269 ; *Flight v. Barton*, ib. 282 ; *Dobell v. Stevens*, 3 B. & C. 623 ; *Pope v. Garland*, 4 Y. & C. 394 ; *Wilson v. Short*, 6 Ha. 366, 377 ; *Drysdale v. Mace*, 2 Sm. & G. 225, 230, 5 D. M. & G. 103 ; *Cox v. Middleton*, 2 Drew. 209 ; *Grosvenor v. Green*, 5 Jur. N. S. 117 ; *Rawlins v. Wickham*, 3 D. & J. 318 ; *Kisch v. Central Venezuela Railway Co.*, 3 D. J. & S. 122 ; *Redgrave v.*

Hurd, 20 Ch. D. 21.

(*l*) *Rawlins v. Wickham*, 3 D. & J. 304. See *Farebrother v. Gibson*, 1 D. & J. 602.

(*m*) *Kent v. Freehold Land and Brickmaking Co.*, 4 Eq. 598.

(*n*) *Reynell v. Sprye*, 1 D. M. & G. 660, 710 ; *Rawlins v. Wickham*, 3 D. & J. 318 ; *Smith v. Reese River Silver Mining Co.*, 2 Eq. 264 ; *Colby v. Galsden*, 15 W. R. 1185 ; *Langham v. East Wheal, &c., Mining Co.*, 37 L. J. Ch. 254 ; *Redgrave v. Hurd*, 20 Ch. D. 21. See *Harris v. Kemble*, 5 Bligh, 730.

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value of the property, he cannot, except under special circumstances, complain that the purchaser has taken the value of the property to be such as he represented it to be (*o*). The effect of what would be otherwise notice may be destroyed not only by actual misrepresentation but by anything calculated to deceive or even to lull suspicion upon a particular point (*p*). A vendor of property on lease, for instance, is not justified in parading upon his particulars of sale the existence of covenants beneficial to the estate which he knows or has good reason to believe cannot be enforced (*q*).

The maxim *caveat emptor* does not apply where there is a positive misrepresentation, essentially material to the subject in question, provided proper diligence be used by the purchaser in the course of the transaction (*r*). The rule at least of *caveat emptor*, where there is misrepresentation, if applicable at all, must be applied with great caution (*s*). Nor will a condition in particulars of sale that misdescriptions or errors in particulars of sale shall not annul the sale cover a fraudulent misrepresentation (*t*).

Misrepresentation must be in respect of a definite fact, and not only of a statement of opinion.

A misrepresentation, to be material, should be in respect of an ascertainable fact, as distinguished from a mere matter of opinion (*u*). A representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its nature and terms, or is merely a loose, conjectural, or exaggerated statement, goes for nothing, though it may not be true, for a man is not justified in placing

(*o*) *Perfect v. Lane*, 3 D. F. & J. 369.

(*p*) *Dykes v. Blake*, 4 Bing. N. C. 463; *Bartlett v. Salmon*, 6 D. M. & G. 41; *Darlington v. Hamilton*, Kay, 550; *Smith v. Harrison*, 26 L. J. Ch. 412; *Sheard v. Venable*, 36 L. J. Ch. 922; *Dart, V. & P.* 96.

(*q*) *Flint v. Woodin*, 9 Ha. 618.

(*r*) *Lowndes v. Lane*, 2 Cox, 363; *Robson v. Earl of Devon*, 4 Jur. N. S. 245.

(*s*) *Colby v. Gadsden*, 15 W. R. 1185.

(*t*) *Duke of Norfolk v. Worthy*, 1 Camp. 337; *Fenton v. Brown*, 14 Ves. 144; *Stewart v. Alliston*, 1 Mer. 26; *Trower v. Newcome*, 3 Mer. 704; *Shuckleton v. Sutcliffe*, 1 Deg. & S. 609; *Leslie v. Tompison*, 9 Ha. 273. See *Edwards v. Wickwar*, 1 Eq. 68.

(*u*) *Lysney v. Selby*, 2 Lord Raym. 1118; *Brunton v. Lister*, 3 Atk. 386; *Vernon v. Keys*, 12 East, 632, 4 Taunt. 448; *Jennings v. Broughton*, 5 D. M. & G. 134; *Higgins v. Samels*, 2 J. & H. 464; *Leyland v. Illingworth*, 2 D. F. & J. 248.

reliance on it (*x*). An indefinite representation ought to put the person to whom it is made upon inquiry (*y*). If he chooses to put faith in such a statement, and abstains from inquiry, he has no ground of complaint (*z*). Mere exaggeration is a totally different thing from misrepresentation of a precise or definite fact (*a*). Such statements, for instance, as assertions as to the value of property (*b*), or representations by the agent of the vendor of land that the title is good (*c*), or mere general terms of commendation (*d*), or mere flourishing or exaggerated statements as to the profits and prospects of a company (*e*), or as to the efficiency and utility of an invention (*f*), or as to the value of securities (*g*), or as to the situation of property (*h*), or mere loose, conjectural, or exaggerated assertions with respect to a subject matter, which is a matter of speculation, or is essentially of an uncertain nature (*i*), or mere conjectural estimates (*k*), are only expressions of opinion or judgment, as to which honest men may well differ materially. Mere general assertions of a vendor of property as to its value, or the price he has been offered for it, or in regard to its condition, qualities,

(*x*) *Haycraft v. Creasy*, 2 East, 92; *Drysdale v. Mace*, 5 D. M. & G. 107; *Kisch v. Central Venezuela Railway Co.*, 3 D. J. & S. 122; *Denton v. Macniel*, 2 Eq. 352; *Dimmock v. Hallett*, 2 Ch. 27; *Anderson v. Pacific Insurance Co.*, L. R. 7 C. P. 65.

(*y*) *Lord Brooke v. Roundthwaite*, 5 Ha. 304; *Dimmock v. Hallett*, 2 Ch. 27.

(*z*) *Ib.*

(*a*) *Higgins v. Samels*, 2 J. & H. 464; *Ross v. Estates Investment Co.*, 3 Eq. 136, 3 Ch. 682.

(*b*) *Harvey v. Young*, Yelv. 20; *Baily v. Merrell*, 3 Bulst. 94, Cro. Jac. 386; *Jendwine v. Slade*, 2 Esp. 572; *Ingram v. Thorp*, 7 Ha. 74; *Ellis v. Andrews*, 15 Amer. R. 379.

(*c*) *Hume v. Pocock*, 1 Ch. 385.

(*d*) *Fenton v. Brown*, 14 Ves. 144; *Trower v. Newcome*, 3 Mer. 704; *Scott v. Hanson*, 1 R. & M. 129;

White v. Cuddon, 8 Cl. & Fin. 766; *Dimmock v. Hallett*, 2 Ch. 26. See *Jennings v. Broughton*, 5 D. M. & G. 126; *Johnson v. Smart*, 2 Giff. 151; *Haywood v. Cope*, 25 Beav. 140; *Higgins v. Samels*, 2 J. & H. 460.

(*e*) *New Brunswick, &c., Railway Co. v. Conybeare*, 9 H. L. 711; *Kisch v. Central Venezuela Railway Co.*, 3 D. J. & S. 122; *Jackson v. Turquand*, 4 E. & L. App. Ca. 309.

(*f*) *Neidefer v. Chastain*, 36 Amer. R. 193.

(*g*) *National Exchange Co. v. Drew*, 23 Dec. of Ct. of Session, 2nd series, p. 1.

(*h*) *Colby v. Gadsden*, 34 Beav. 416.

(*i*) *Jennings v. Broughton*, 5 D. M. & G. 136; *Stephens v. Venables*, 31 Beav. 124.

(*k*) *Irvine v. Kirkpatrick*, 7 Bell. Sc. Ap. Ca. 186.

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and characteristics ; as, for instance, that land is fertile and improvable, or that soil is adapted for a particular mode of culture, or is well watered, or is capable of producing crops, or supporting cattle, or that a house is a desirable residence, &c., are assumed to be so commonly made by persons having property for sale, that a purchaser cannot safely place confidence in them. Affirmations of the sort are always understood as affording to a purchaser no ground for neglecting to examine for himself, and ascertain the real condition of the property. They are, strictly speaking, *gratis dicta*. A man who relies on such affirmations, made by a person whose interest might so readily prompt him to invest the property with exaggerated value, does so at his peril, and must take the consequences of his own imprudence ; *emptor emit quam minimo potest ; venditor vendit quam maximo potest* (l). Although such affirmations may be erroneous or false, they will not, except in extreme cases, be regarded as evidence of a fraudulent intent (m). A statement of value may, however, be so plainly false, as to make it impossible for the party to have believed what he stated (n). So, also, statements with respect to the quality or condition of land, will, if erroneous or false, amount in extreme cases to a misrepresentation in law (o). So, also, a statement in the prospectus of a company, that the promoters of the company had taken "a large portion" of the shares, though vague in its nature, will amount, in extreme cases, to a misrepresentation (p).

(l) 1 Roll. Ab. 101, pl. 16 ; *Leakins v. Clissell*, 1 Sid. 146, 1 Lev. 102 ; *Harvey v. Young*, Yelv. 20 ; *Trower v. Newcome*, 3 Mer. 704 ; *Scott v. Hanson*, 1 R. & M. 129 ; *Parker v. Moulton*, 19 Amer. R. 315 ; *Mooney v. Miller*, 6 Browne (Amer.), 218 ; *Poland v. Brownell*, 17 Lathr. (Amer.), 138. The Roman law concerning the effect of puffing one's wares was stated : *Ea quæ commendandi causa in venditionibus dicuntur, si palam appa-*

reant, venditorem non obligant, veluti si dicat servum speciosum, domum bene ædificatam. Dig. lib. 18 tit. 1, r. 43.

(m) *Dimmock v. Hallett*, 2 Ch. 26 ; *Kenner v. Harding*, 28 Amer. R. 617.

(n) *Wall v. Stubbs*, 1 Madd. 80 ; *Ingram v. Thorp*, 7 Ha. 74.

(o) *Dimmock v. Hallett*, 2 Ch. 26.

(p) *Henderson v. Lacon*, 5 Eq. 257.

An assertion that a third person has offered a specified sum for the property, though false, is, like mere statements of value, an assertion of so vague and loose a character, that a purchaser is not justified in relying on it (*q*).

The difference between a false averment in matter of fact, and a like falsehood in matter of judgment, opinion, and estimate, is well illustrated by familiar cases in the books. If the owner of an estate affirm that it will let or sell for a given sum, when, in fact, such sum cannot be obtained for it, it is, in its own nature, a matter of judgment, and so the parties must have considered it (*r*). But if an owner falsely affirm that an estate is let for a certain sum, when it is, in fact, let for a smaller sum, or that the profits of a business are more than, in fact, they are, and thereby induces a purchaser to give a higher price for the property, it is fraud, because the matter lies within the private knowledge of the owner (*s*). If, again, the owner of land represent that it is well watered, the statement will not, although erroneous or false, amount in law to a misrepresentation, except in extreme cases (*t*); but if he represent that land is situated on the banks of a river, whereas it is some miles off from the river, there is misrepresentation, for the false representation is in respect of a precise and definite fact (*u*). So, also, is there misrepresentation of a fact, if the representation be calculated to lead the person to whom it is made to believe that there is a natural supply of water on the property, whereas the fact is that the property, though well supplied with water, derives its supply artificially from the waterworks of a town, and by payment of rates (*x*).

(*q*) *Sug. V. & P.* 3, 1 Roll. Ab. 101, pl. 16.

(*r*) *Harvey v. Young*, Yelv. 20, 1 Roll. Ab. 801, pl. 16; *Leakins v. Clissell*, 1 Sid. 146; *Pasley v. Freeman*, 3 T. R. 51; comp. *Dimmock v. Hallett*, 2 Ch. 28.

(*s*) *Ekins v. Tresham*, 1 Lev. 102; *Lysney v. Selby*, 2 Lord Raym. 1118; *Dobell v. Stevens*, 3 B. & C. 623;

Intehinson v. Morley, 7 Scott, 341; *Dimmock v. Hallett*, 2 Ch. 28.

(*t*) *Scott v. Hanson*, 1 R. & M. 129; *Trower v. Newcome*, 3 Mer. 704.

(*u*) *Van Epps v. Harrison*, 5 Hill (Amer.), 67.

(*x*) *Leyland v. Illingworth*, 2 D. F. & J. 253.

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The representation of an actual state of things as existing, is equivalent to the misrepresentation of a fact (*y*).

In *Vernon v. Keys* (*z*), the true rule was stated to be that the seller was liable to an action of deceit, if he fraudulently misrepresent the quality of the thing sold in some particulars which the buyer has not equal means of knowledge with himself; or if he do so in such a manner as to induce the buyer to forbear making the enquiries which, for his own security and advantage, he would otherwise have made.

Exaggeration as distinguished from misrepresentation.

The rule in regard to representations of value applies to mere representation or expressions of opinion respecting the solvency of third persons. A party has no right to rely on them (*a*). The rule that exaggeration, as distinguished from misrepresentation, goes for nothing, applies with peculiar force to the case of statements in the prospectuses of companies. The promoters of adventures are so prone to form sanguine expectations as to the prospects of the schemes which they introduce to the public, that some high colouring and some exaggeration in the description of the advantages which are likely to be enjoyed by the subscribers to the undertaking, may generally be expected in such documents. No prudent man can, owing to the well-known prevalence of exaggeration in such documents, accept the prospects which are held out by the originators of every new scheme, without considerable abatement. But though the representations in the prospectus of a company ought not, perhaps, to be tried by as strict a test as is applied in other cases, they are required to be fair, honest, and *bonâ fide*. There must be no misstatement of any material facts or circumstances (*aa*).

Disparagement of property by a purchaser.

As, on the one hand, mere assertions of value by the vendor of property are not fraudulent in law, though erroneous or false; so, on the other hand, a disparagement of property by a purchaser is not a fraud (*b*). Nor is a buyer liable for misrepresenting a seller's chance of sale or probability

(*y*) *Pigott v. Stratton*, John. 359,
1 D. F. & J. 49.

(*z*) 12 East, 632.

(*a*) *Homer v. Perkins*, 26 Amer.
R. 679.

(*aa*) *Kisch v. Central Railway Co.*

of Venezuela, 3 D. J. & S. 122;
Denton v. Macneil, 2 Eq. 352; *Central Railway Co. of Venezuela v. Kisch*, 2 E. & I. App. Ca. 113;
Hallours v. Fernie, 3 Ch. 467.

(*b*) *Tate v. Williamson*, 2 Ch. 65.

of his getting a better price. It is a false representation in a matter merely *gratis dictum* by the bidder, in respect of which he is under no legal duty to the seller for the correctness of his statement, and upon which the seller would be incautious to rely (c). So, also, is a representation by a purchaser to a seller, that his partners would not consent to his giving more than a certain sum, though false, merely a *gratis dictum* (d).

But though the value of property is generally a matter of opinion, a vendor may put upon a purchaser the responsibility of informing him correctly as to the market value, or any other fact known to him, affecting the value of property, and if the purchaser answers untruly there is fraud. He is not bound to answer in such cases, but if he does he is bound to speak the truth (e). In a case accordingly, where the seller was ignorant of the value of the property and the purchaser knew that she knew nothing about it, and the seller asked the purchaser the value of the property and relied upon his statement, which was greatly below the value, the sale was set aside (f). "This," said Wickens, V.-C. (g), "was not a mere purchaser's assessment, but a deliberate statement made to her by a person having full knowledge, which statement was asked by her for her guidance and was acted on by her in reliance on its good faith and accuracy."

Vendor may put upon purchaser the responsibility of informing him as to value.

There may be cases in which a purchaser may rely on the representations of the vendor. When, for instance, from a long course of dealing, the party making the representation knows that the other has become accustomed to act upon his representations, he may not presume upon such confidence to impose a falsehood. So also where peculiar means of knowledge are possessed by the vendor and are not open to the purchaser, as where a dealer in precious stones trades with one inexperienced and ignorant of the value of such articles. Acquaintance with such values or the tests of quality is not acquired at once or by the mere asking; it requires training and time. So, if a dealer

(c) *Vernon v. Keys*, 12 East, 637. v. *Chapman*, 28 Amer. R. 8.

(d) *Ib.*

(f) *Haygarth v. Wearing*, 12 Eq.

(e) *Smith v. Countryman*, 3 Tiff. 320.

(Amer.), 683, *per* Miller, J.; *Atwood* (g) *Ib.* 328.

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knows that a person is confined to his room by injury or disease and compelled to depend on the information brought to him, and, indeed, generally, when the parties cannot by reasonable care and diligence place themselves upon equal terms, the law casts a higher obligation to reveal the truth (*h*). But if a vendor, being asked the market price of an article in common use, makes a false representation, and the vendee chooses to accept the statement so made, and to act upon it instead of making enquiry as to the market price, he cannot repudiate his contract on the ground of the falsity of the statement (*i*).

Representations
as to price and
moneys spent
upon land.

The representations of a vendor of real estate to the vendee as to the price which he has paid for it are, in respect of the reliance to be placed on them, to be regarded generally in the same light as representations respecting its value, or the offers which have been made for it. A purchaser is not justified in placing confidence on them (*k*). But a false affirmation by a vendor as to the actual cost of property (*l*), or as to the amount spent upon it by him in improvements (*m*), may amount to a fraudulent misrepresentation.

A vendor is not bound to disclose to the vendee the true ownership of the property he is engaged in selling, but he is bound to abstain from making any misrepresentations respecting the ownership (*n*).

False represen-
tation as to
intention.

As distinguished from the false representation of a fact, the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law (*o*), nor does it afford a ground for relief in equity (*p*). Where a man was induced to grant a

(*h*) *Graffenstein v. Eppstein*, 33 Amer. R. 171.

(*i*) *Ib.*

(*k*) *Medbury v. Watson*, 6 Metc. (Amer.), 259; *Hemmer v. Cooper*, 8 Allen (Amer.), 334; *Holbrook v. Connor*, 11 Amer. R. 214, 20 Eq. 123, *per* Bacon, V. C.

(*l*) *Kent v. Freehold Land Co.*, 4 Eq. 599; *Lindsey Petroleum Co. v. Hurd*, L. R. 5 P. C. 243; *Van Epps v. Harrison*, 5 Hill (Amer.), 67.

(*m*) *Ross v. Estates Investment Co.*, 3 Eq. 136, 3 Ch. 682.

(*n*) *Hill v. Gray*, 1 Stark. 434; *Maturin v. Tredennick*, 2 N. R. 514; but *comp. Fellows v. Lord Gwydyr*, 1 R. & M. 83; *Nelthorpe v. Holgate*, 1 Coll. 203.

(*o*) *Vernon v. Keys*, 12 East, 637; *Hemingway v. Hamilton*, 4 M. & W. 122; *Feret v. Hill*, 15 C. B. 225.

(*p*) *Jorden v. Money*, 5 H. L. 185; *Bold v. Hutchinson*, 5 D. M. & G.

lease of certain premises to another, upon a representation that he intended to use the premises for a stated purpose, whereas he intended to use, and did use, them for a different and illegal purpose, it was held that the misrepresentation did not entitle the lessor to have the lease avoided (*q*). So, also, where a man who had given a bond to another, upon which judgment had been entered up, had married upon the declaration of the person who held the bond and warrant of attorney, that she had abandoned the claim, and would never trouble him about it, the court would not restrain her from enforcing at law the judgment on the warrant of attorney (*r*). But if the representation, though in form a representation as to a matter of intention, amounts in effect to a representation as to a matter of fact, relief may be had in equity. Where, accordingly, a lessor, pending an agreement for a building lease, represented to the intended lessee, that he could not obstruct the sea view from the houses to be built by the lessee, because he himself was a lessee under a lease for 999 years, containing covenants which restricted him from so doing; but after the building lease had been taken, and the houses built upon the faith of the representation, the lessor surrendered his 999 years' lease, and took a new lease omitting the restrictive covenants, the Court, considering the representation to have been in effect a representation as to a matter of fact, restrained the lessor by injunction from building so as to obstruct the sea view (*s*).

It is necessary to distinguish where an alleged ground of false representation is set up between a representation of an existing fact which is untrue, and a promise to do something in future, and to consider what the bargain is (*t*). But the existing intention of a party at the time of contracting is a matter of fact, and may be material to the validity of a contract, so that if it be proved that a person has fraudulently misrepresented his inten-

558; *Kay v. Crook*, 3 Sm. & G. 407; comp. *Yeomans v. Williams*, 1 Eq. *M'Caskie v. McCay*, 1 R. 2 Eq. 453. 185.

(*q*) *Feret v. Hill*, 15 C. B. 207. (*s*) *Piggott v. Stratton*, John. 359,

(*r*) *Jorden v. Money*, 5 H. L. 185. 1 D. F. & J. 49.

See *Cross v. Sprigge*, 6 Ha. 553; (*t*) *Ex parte Burrell*, 1 Ch. D. 552, *Mounsell v. Hedges*, 4 H. L. 1039; per Mellish, L. J.

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tions in some material point for the purpose of inducing a contract, it may be a sufficient ground for avoiding the contract. Thus a man buying goods must be taken to have made an implied representation that he intended to pay for them, so that if it be clearly made out that at that time he did not intend to pay for them, a case of fraudulent misrepresentation is made out, and the seller may avoid the sale, and recover back the goods from the buyer, or from any person to whom he has transferred them with notice of the sale (*u*). So, also, when a lessee having power to assign only with the consent of his landlord, which the landlord had promised to give upon his finding a respectable tenant, was induced to assign the lease by a false representation of the assignee that a certain intended tenant was a respectable man, it was held that the representation although only of an intended tenant, involved a sufficiently material fact to avoid the agreement (*x*).

There is a clear distinction between a misrepresentation in point of fact, a representation that something exists at that moment which does not exist, and a representation that something will be done in the future. Of course a representation that something will be done in the future cannot either be true or false at the moment it is made, and although it may be called a representation, if it is anything, it is a contract or promise (*y*).

A representation which amounts to a mere expression of intention must be distinguished from a representation which amounts to an engagement. If a representation amounts to an engagement, the party making it is bound in equity to make it good (*z*). Where, for instance, a man previously to the marriage of his daughter said he intended to leave her 10,000*l.* which was to be settled in a particular way, and that the person about to marry her was for this reason to settle 5,000*l.*

(*u*) *Load v. Green*, 15 M. & W. 216; *White v. Garden*, 10 C. B. 919; *Ex parte Whittaker*, 10 Ch. 449, per Mellish, L. J.

(*x*) *Capham v. Barry*, 15 C. B. 597. See *Feret v. Hill*, 15 C. B. 207.

(*y*) 7 Ch. 804, per Mellish, L. J.

(*z*) *Hammersley v. De Biel*, 12 Cl. & Fin. 45; *Maunsell v. Hedges*, 4 H. L. 1056; *Loxley v. Heath*, 1 D. F. & J. 492; *Loffus v. Maw*, 3 Giff. 592; *Coverdale v. Eastwood*, 15 Eq. 129.

on her, and the party did make the settlement and married the lady, the engagement was held binding, for the circumstances amounted to a contract (*a*). If, on the other hand, a man previously to the marriage of a relation tells him that he has made his will and left him his property, and that he is confident he never would alter his will to his disadvantage, or tells him before his marriage to his daughter that he would leave her so much money, this is a mere expression of intention, on which the person to whom it is addressed is not justified in relying (*b*). So, also, when an unattested paper signed by A., and handed by him to B., stated that as a mark of his esteem and great friendship, he agreed to allow him 500*l.* a year, and that after his death, he had in lieu thereof, bequeathed him 10,000*l.*; and B. took the paper to a lady who consented to his marriage with her daughter on the faith of the engagement contained in the paper, but no communication took place between the lady and A., and the marriage took place, it was held that there was no such connection between A.'s promise or representation, and the consent given by the lady as to sustain a claim against A.'s estate (*c*). A representation which amounts to an engagement is enforced not as being a representation of an intention, but as amounting to a contract (*d*). There is no middle term, no *tertium quid*, between a representation so made to be effective for such a purpose and being effective for it and a contract (*e*).

Where after correspondence and proposals of settlement previously to a marriage, a formal settlement is executed, the settlement will supersede the proposals contained in the correspondence, and will be taken to embody all the contract which existed between the parties at the time when it was executed (*f*).

(*a*) *Hammersley v. De Biel*, 12 Cl. & Fin. 45. See *Barkworth v. Young*, 4 Drew. 1; *Prole v. Soady*, 2 Giff. 20; *Loffus v. Maw*, 3 Giff. 592; *Alt v. Alt*, 4 Giff. 84.

(*b*) *Bold v. Hutchinson*, 5 D. M. & G. 558; *Mauunsell v. Hedges*, 4 H. L. 1039; *Loxley v. Heath*, 1 D. F. & J. 492; *Laver v. Gilder*, 32 Beav. 4.

(*c*) *Dashwood v. Jermyn*, 12 Ch. D. 776.

(*d*) *Bold v. Hutchinson*, 5 D. M. & G. 558; *Mauunsell v. Hedges*, 4 H. L. 1056; *Loxley v. Heath*, 1 D. F. & J. 492; *Coverdale v. Eastwood*, 15 Eq. 129.

(*e*) 4 H. L. 1056, *per* Lord Cranworth.

(*f*) *Loxley v. Heath*, 1 D. F. & J.

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Misrepresentation as to matter of law.

A misrepresentation of a matter of law does not constitute a fraud, because the law is presumed to be equally within the knowledge of all the parties. Thus the misrepresentation of the legal effect of a written agreement which a party signs with a full knowledge of its contents is not a sufficient ground for avoiding the agreement (*g*). So, also, where the directors of a company borrowed money, and issued to the lender a bond in a form that they represented to be valid, but which, according to the general law of such companies, was invalid, it was held that they were not responsible for their representation, as it was merely a matter of law, and was made to a person who was equally informed of the facts, and to whom they held no fiduciary relation as advisers (*h*). So, also, when an agent in a recognised position as the director of a company, represents that he has authority by virtue of his office to bind the company, the extent of the authority incident to the office being a matter of general law within the knowledge of the party to whom the representation is made, the latter must trust to such representation of authority at his own risk (*i*). So, where an agent represents himself to be an authorised agent under a power of attorney, the extent of his authority depends upon the construction of the power and not upon his assertion respecting it (*k*). Nor does the principle of relief in equity on the ground of misrepresentation by third persons extend to an incorrect statement of the law. If, for example, a person asks another what the law was upon a particular point and acts upon the representation so made, and thereby alters his position to his prejudice, he cannot maintain an action in equity against the latter to make good the representation (*l*).

In a case when the solicitors of trustees of a fund, accepted notice from a mortgagee of part of the fund on behalf of the trustees, it was held that as they were acting under an opinion erroneous in point of law, that their employment as solicitors

489 ; *Kingdon v. Tagert*, 17 Ch. D. 777, 7 E. & I. App. Ca. 102.
363.

(*k*) *Ib.*, 800, *per* Mellish, L. J.

(*g*) *Lewis v. Jones*, 4 B. & C. 506.

(*l*) *Ib.* ; *Rashdall v. Ford*, 2 Eq.

(*h*) *Rashdall v. Ford*, 2 Eq. 750.

750.

(*i*) *Beattie v. Lord Ebury*, 7 Ch.

enabled them to accept service, they were not liable (*m*). So, also, the assertion by a man of what he thinks himself entitled in point of law to assert is not a misrepresentation, though it may not strictly be correct (*n*).

But matters of private right, although depending on rules of law and legal rules of construction, are in general to be considered as matters of fact in reference to fraud, and therefore it seems that the misrepresentation of the legal effect of a written agreement which the other party is thereby induced to sign, if otherwise fraudulent, would be sufficient ground for avoiding an agreement (*o*). It has been said that "a statement of fact which involves, as most facts, a conclusion of law, is still a statement of fact and not a statement of law." Such are statements regarding personal status, the possession of property, and other statements regarding matters of private right (*p*).

To constitute a fraudulent representation, the representation need not be made in terms expressly stating the existence of some fact which does not exist. If a statement be made by a man in such terms as would naturally lead the person to whom it was made to suppose the existence of a certain state of facts, and if such statement be so made designedly and fraudulently, it is as much a fraudulent misrepresentation as if the statement of an untrue fact were made in express terms (*q*). A man, moreover, who makes a representation is not only answerable for what he in his own mind intended to represent, but he is answerable for what any one might reasonably suppose to be the meaning of the words he used (*r*).

A representation may be false by reason not only of positive

(*m*) *Saffron Walden, &c., Society v. Rayner*, 14 Ch. D. 406.

(*n*) *Legge v. Croker*, 1 Ba. & Be. 506; *Wilde v. Gibson*, 1 H. L. 626; *New Brunswick, &c., Railway Co. v. Conybeare*, 9 H. L. 711; *Brett v. Clouser*, 5 C. P. D. 376; *Brownlie v. Campbell*, 5 App. Ca. 931.

(*o*) *Hirschfield v. London & North Western Railway Co.*, 2 Q. B. D. 1.

(*p*) *Eaglefield v. Lord London-*

derry, 4 Ch. D. 702, *per* Jessel, M.R.

(*q*) *Lee v. Jones*, 17 C. B. N. S. 510, *per* Crompton, J.; *Lowndes v. Lane*, 2 Cox, 363; *Walker v. Symonds*, 3 Sw. 73; *Drysdale v. Mace*, 5 D. M. & G. 103; *Flint v. Woodin*, 9 Ha. 621; *comp. Bold v. Hutchinson*, 5 D. M. & G. 558.

(*r*) *Arkwright v. Newbold*, 17 Ch. D. 320.

Misrepresentation need not be in express terms.

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misstatements contained in it, but by reason of intentional suppression whereby the information it gives assumes a false colour, giving a false impression, and leading necessarily, or almost necessarily to erroneous conclusion (s). *Fallit et qui obscure loquitur et qui dissimulat insidiosae vel obscure (t). Dolum malum a se abesse praestare venditor debet: qui non tantum in eo est qui fallendi causa obscure loquitur; sed etiam qui insidiosae, obscure dissimulat (u).*

There is a misrepresentation if a statement be so made that the acuteness and industry of the person to whom it is made is set to sleep, and he is induced to believe the contrary of what is the real state of the case (x). If, for instance, there is a misrepresentation as to the terms of a particular covenant, which turned out to be of a much more stringent description (y); or, if omission be made of a covenant involving an onerous obligation (z); or if particulars of sale are minute as to the value of the property, so as to induce a purchaser to believe that all material particulars have been furnished, but a material particular has been kept back (a), there is fraud. So also where conditions of sale are so obscurely worded that when taken in connection with the particulars of sale they are likely to mislead an ordinary purchaser as to the nature of the property (b), or are so framed as to deceive a purchaser and throw him off his guard by suppressing facts, and so masking a gross defect on the title (c), there is fraud. So also when a condition of sale induces the purchaser to believe that a recital accurately represents a will, which it does not, it is a fraudulent and misleading condition (d).

(s) *Cullen's Trustee v. Johnston*, 3 Dec. of Court of Session, 3rd series, p. 936; *Peck v. Gurney*, 6 E. & I. App. Ca. 400.

(t) Dig. lib. 18, tit. 1, leg. 43,

(u) *Ib.*

(x) *Pope v. Garland*, 4 Y. & C. 401; *Peck v. Gurney*, 6 E. & I. App. Ca. 391.

(y) *Flight v. Booth*, 1 Bing. N. C. 377; *Van v. Corpe*, 3 M. & C. 269;

Flight v. Barton, ib. 282.

(z) *Cullen v. O'Meara*, I. R. 4 C. L. 138.

(a) *Jones v. Rimmer*, 14 Ch. D. 588.

(b) *Taylor v. Martindale*, 1 Y. & C. C. 658; *Torrance v. Bolton*, 8 Ch. 118.

(c) *Boyd v. Dickson*, I. R. 10 Eq. 254.

(d) *Else v. Else*, 13 Eq. 200.

A representation though true to the letter may be in substance a misrepresentation (*e*). There is a misrepresentation if a statement is calculated to mislead or throw the person to whom it is made off his guard, though it may be literally true (*f*). Where particulars of sale contain a statement which is literally true but which is capable of another meaning, and such other meaning is more likely to be taken than the true one by a man reading the particulars, the purchaser, if he knows nothing of the real facts and understands the particulars in the one sense, is entitled to say that the vendor has deceived him (*g*).

If a man states a thing partially, he may make a false statement as much as if he had misstated it altogether. Every word he says may be true, but if he leaves out something which qualifies it, he may make a false statement (*h*).

There is misrepresentation if a man represents not the whole of the facts, but only a portion, and omits what he ought to have known was a very material fact. It is an untruthful representation by reason of suppression and concealment of truth, not untruthful in the sense of direct falsehood, but untruthful because it is intended to convey to the public an impression different from the reality, and because it is known by the person who makes it or ought to be known by him to be materially different from that which was the real state of the case (*i*). It is the duty of the vendor of property to make himself acquainted with all the peculiarities and incidents of the property which he is going to sell, and when he describes the property for the information of a purchaser it is his duty to describe everything which it is material for him to know in order to judge of the nature and value of the property. It is not for him just to tell what is not actually untrue, leaving out a great

(*e*) *Lowndes v. Lane*, 2 Cox, 363 ; *Flint v. Woodin*, 9 Ha. 618 ; *Stanton v. Tattersall*, 1 Sm. & G. 529 ; *McCulloch v. Gregory*, 1 K. & J. 286 ; *Clarke v. Dickson*, 6 C. B. N. S. 453 ; *Ross v. Estates Investment Co.*, 3 Ch. 682.

(*f*) *Edwards v. Wickwar*, 1 Eq. 68 ; *Dimmock v. Hallott*, 2 Ch. 28 ;

Ross v. Estates Investment Co., 3 Ch. 682 ; *Peek v. Gurney*, 6 E. & I. App. Ca. 400.

(*g*) *Cato v. Thompson*, 9 Q. B. D. 619.

(*h*) *Arkwright v. Newbold*, 17 Ch. D. 318, *per James*, L. J.

(*i*) *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 935.

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deal that is true, and leaving it to the purchaser to enquire whether there is any error or omission in the description or not (*k*).

In conditions of sale there must not be any representation or condition which can mislead the purchaser as to the facts within the knowledge of the vendor, and the vendor is not at liberty to require the purchaser to assume as the root of his title that which documents in his possession show not to be the fact, even though those documents may show a perfectly good title on another ground. The requirement or insistence in conditions of sale that a certain state of things shall be assumed, does by implication contain an assertion that no facts are known to the persons who require it, which would make that assumption a wrong one according to the facts. A condition is therefore bad as misleading, if it requires the purchaser to assume what the vendor knows to be false, or if it states that the state of the title is not accurately known when in fact it is known to the vendor (*l*). Though a purchaser will not be bound, if a vendor makes an untrue statement in the conditions of sale and then tries to bind the purchaser by a condition, the case is otherwise if the vendor merely does not state everything in the conditions of sale, but invites the purchaser to come and see a certain document for himself, which the conditions of sale tell him is of importance. In such a case the purchaser will be bound by a condition that he shall assume the truth of the document (*m*). Instead of setting out the whole of the documents in conditions of sale or else an abstract, in which event he is liable to be charged with having stated them incorrectly, a vendor may invite attention to documents (*n*).

When the sale is by the Court, the Court is bound to take more especial care, if possible, that there shall be nothing in the conditions or in the representations therein contained which can by possibility mislead a purchaser, because the purchaser

(*k*) *Bradling v. Plummer*, 2 Drew. 430. See *Broad v. Manton*, 12 Ch. D. 136.

(*l*) *Broad v. Manton*, 12 Ch. D. 150, *per* Cotton, L. J. See *Harnett*

v. Baker, 20 Eq. 50.

(*m*) *Blenkhorn v. Penrose*, 29 W. R. 238.

(*n*) *Ib.*

has a right to assume that the Court will take good care that there shall be nothing that can in any way mislead him as to the title he is getting (*o*).

A misrepresentation is usually by words; but it may be as well by acts or deeds, as by words; by artifices to mislead as well as by actual assertions. Even in chaffering about goods there may be such misrepresentation as to avoid a contract. A man who by act or deed falsely and fraudulently impresses the mind of another with a certain belief whereby he is misled to his injury is as much guilty of a misrepresentation as if he had deliberately asserted a falsehood (*p*). It is a fraud to impress upon a vendible article the trade-mark of another in order to give it greater currency in the market (*q*).

It is not enough that there has been a misrepresentation, and that the misrepresentation has conduced in some way to the transaction in question. It is necessary that the misrepresentation should have been made in relation to the transaction in question, and with the direct intent to induce the party to whom it is immediately made, or a third party, to act in the way that occasions the injury (*r*). A representation which has been made some time before the date of the transaction in question is not sufficient, unless it can be clearly shown to have been immediately connected with it (*s*). A representation to

Intent of the representation.

(*o*) *Broad v. Munton*, 12 Ch. D. 150, *per* Cotton, L. J.

(*p*) *Sibbald v. Hill*, 2 Dow. 266; *Lovell v. Hicks*, 2 Y. & C. 55; *Crawshay v. Thornton*, 4 M. & G. 387; *Burnes v. Pennell*, 2 H. L. 497.

(*q*) *Crawshay v. Thornton*, 4 M. & G. 387. See Kerr on Injunctions, p. 358.

(*r*) *East India Co. v. Henckman*, 1 Ves. J. 287; *Dobell v. Stevens*, 3 B. & C. 623; *Harris v. Kemble*, 5 Bligh, N. S. 730; *Attwood v. Small*, 6 Cl. & Fin. 232, 445; *Irvine v. Kirkpatrick*, 7 Bell, Sc. Ap. Ca. 186; *Burnes v. Pennell*, 2 H. L. 497, 529; *Smith v. Kay*, 7 H. L. 750, 775;

National Exchange Co. v. Drew, 2 Macq. 120; *Nicoll's Case*, 3 D. & J. 387, 440; *Jameson v. Stein*, 21 Beav. 5; *Denne v. Light*, 8 D. M. & G. 774; *Barry v. Crosskey*, 2 J. & H. 1; *Way v. Hearne*, 32 L. J. C. P. 34; *Queen v. Sadler's Co.*, 10 H. L. 404; *Peck v. Gurney*, 6 E. & I. App. Ca. 412.

(*s*) *Burnes v. Pennell*, 2 H. L. 497, 530. See *Nicoll's Case*, 3 D. & J. 439; *Wheulton v. Hardisty*, 8 E. & B. 232; *Maunsell v. Hedges*, 4 H. L. 1060, *per* Lord St. Leonards; *Barrett's Case*, 3 D. J. & S. 30; *Western Bank of Scotland v. Addie*, 1 Sc. App. Ca. 155.

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be of any avail whatever must, unless under special circumstances, have been made at the time of the treaty (*t*), and should not have any relation to any collateral matter or other relation or dealing between the parties (*u*).

Misrepresentation must be attended with damage.

Misrepresentation, however, goes for nothing either at law or in equity unless a man has been misled thereby to his prejudice. Fraud without damage is not sufficient to support an action (*x*). But it is enough if the representation operates to the prejudice of a man to a very small extent (*y*). Fraud gives a cause of action if it leads to any sort of damage (*z*). But in order that a false representation should give a cause of action the damage must be the immediate and not the remote effect of the representation (*a*).

Concealment.

Misrepresentation may consist as well in the concealment of what is true as in the assertion of what is false (*b*). If a man conceals a fact that is material to the transaction, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if the existence of such fact were expressly denied or the reverse of it expressly stated (*c*). Concealment to be of any avail whatever, either at law or in equity, must be *dolus dans locum contractui*. There must be the suppression of a fact, the knowledge of which it is reasonable to infer would have made the other party to the transaction abstain from it altogether. Concealment of a fact is not material if the statement of that fact would not have induced a man (otherwise desirous of entering into the transaction) to abstain from it (*d*). A concealment to be material must be

(*t*) *Harris v. Kemble*, 1 Sim. 122, per Sir J. Leach, M. R.. See *Wheleston v. Hardisty*, El. Bl. & El. 232; *Hotsom v. Browne*, 9 C. B. N. S. 445; *Smith v. Kay*, 7 H. L. 750.

(*u*) *Harris v. Kemble*, 1 Sim. 122, 5 Blich, N. S. 730; *National Exchange Co. v. Drew*, 2 Macq. 103.

(*x*) *Polhill v. Walter*, 3 B. & Ad. 114; *Fellowes v. Lord Gwydyr*, 1 Sim. 63, 1 R. & M. 83. See *Flint v. Woodin*, 9 Ha. 618.

(*y*) *Cadman v. Horner*, 18 Ves. 10.

(*z*) *Smith v. Kay*, 7 H. L. 750, 775.

(*a*) *Barry v. Crosskey*, 2 J. & H. 1.

(*b*) *Tapp v. Lee*, 3 B. & P. 371; *Central Railway Co. of Venezuela v. Kisch*, 2 E. & I. App. Ca. 114; *Oakes v. Turquand*, ib. 326.

(*c*) *Peek v. Gurney*, 6 E. & I. App. Ca. 400.

(*d*) *Pulsford v. Richards*, 17 Beav.

the concealment of something that the party concealing was under some legal or equitable obligation to disclose (e). Chap. II.

Mere non-disclosure apart from circumstances importing a duty of informing the other party, or evidencing a fraudulent intention in not informing him, is not in general a sufficient ground for avoiding a contract. Where accordingly a governess had been engaged under a written agreement, in which she was described as a "spinster," it was held that the mere non-disclosure of the fact that she had been married and divorced was not alone a sufficient ground for avoiding the agreement (f). "There is no allegation of fraud," said Lord Blackburn (g), "and short of that the mere concealment of a material fact, except in policies of assurance, does not avoid a contract." So with a promise to marry, it was held to be no ground for avoiding the contract that it had not been disclosed that the promisee was at the time of the promise under a pre-contract to marry another person (h); or that the promisee had at one time been insane and confined in a lunatic asylum (i). "There are many things," said Chief Justice Cockburn (j), "which a man might desire to have communicated to him if they existed at the time of making the contract, as that the plaintiff is in debt, or subject to other liabilities, or some circumstances relating to her person, her temper, her disposition, the discovery of which would yet

98; *Peck v. Gurney*, 6 E. & I. App. Ca. 400. See *Davies v. Cooper*, 5 M. & C. 270; *Vane v. Cobbold*, 1 Exch. 798; *New Brunswick, &c., Railway Co. v. Muggeridge*, 1 Dr. & Sm. 363; *Kisch v. Central Venezuela Railway way Co.*, 3 D. J. & S. 122.

(e) *Irvine v. Kirkpatrick*, 7 Bell, Sc. Ap. 186; *Horsfall v. Thomas*, 1 H. & C. 100, *per* Bramwell, B.; *Archbold v. Lord Hawth*, L. R. Ir. 2 C. L. 629; *London Assurance Co. v. Mansel*, 11 Ch. D. 367. See *Dalbiac v. Dalbiac*, 16 Ves. 124; *Dalby v. Pullen*, 1 R. & M. 296; *Adamson v. Evitt*, 2 R. & M. 72; *Harris v. Kemble*, 1 Sim. 111, 5 Bligh, 730; *Roddy v. Williams*, 3 J. & L. 21;

Machure v. Ripley, 2 Mac. & Gr. 274; *Beck v. Kantorowicz*, 3 K. & J. 247; *Haywood v. Cope*, 25 Beav. 140; *Evans v. Carrington*, 1 J. & H. 598, 2 D. F. & J. 481; *Greenfield v. Edwards*, 2 D. J. & S. 582, 598; *Central Venezuela Railway Co. v. Kisch*, 2 E. & J. App. Ca. 112; *Re Madrid Bank*, 2 Eq. 216.

(f) *Fletcher v. Krell*, 42 L. J. Q. B. 55.

(g) *Ib.*

(h) *Beachey v. Brown*, E. B. & E. 796.

(i) *Baker v. Cartwright*, 10 C. B. N. S. 124.

(j) *Ib.*

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not entitle the defendant to refuse to fulfil his engagement. It might be right to disclose such things, and yet it has never been held that the discovery of them justified a party in breaking his contract." But a promise to marry a woman is impliedly conditional upon the fact of her being chaste, and consequently the fact of unchastity, if not disclosed, would avoid the contract (*k*).

If the fact is one which ought to have been disclosed, the circumstance that it may not have been disclosed through mistake, ignorance, or forgetfulness, cannot be taken into consideration. It is immaterial that the concealment may not have been wilful or intentional, or with a view to private advantage (*l*). It is also essential that the concealment should be in reference to the particular transaction (*m*), and should enure to the date of it. If a party to a transaction conceals, however fraudulently, a material fact from another with whom he is treating, but that other, notwithstanding the concealment, gets at the fact concealed before he enters into the transaction, the concealment goes for nothing. It is of no avail, if the party has become in any way acquainted with the truth (*n*). *Scientia utrinque par pares contrahentes facit*. The law will not interpose, where both parties to the transaction are equally well informed or are in equal ignorance as to the actual condition or value of the subject matter of the transaction (*o*).

The principles of morals require more scrupulous good faith in the dealings of men with each other than is exacted either at law or in equity. The writers of the moral law hold it to be the duty of the seller to disclose the defects which are within his knowledge (*p*). But the common law is not so strict. The law aims at practical good and general convenience rather than

(*k*) *Young v. Murphy*, 3 Bing. N. C. 54; *Baker v. Cartwright*, 10 C. B. N. S. 124, per Cockburn, C. J.

(*l*) *Pusey v. Desbouverie*, 3 P. Wms. 315; *Bowles v. Stuart*, 1 Sch. & Lef. 249; *Brydges v. Branfil*, 12 Sim. 384; *Willis v. Willis*, 17 Sim. 218; *Railton v. Matthews*, 10 Cl. & Fin. 934.

(*m*) *Green v. Gosden*, 3 M. & G. 446.

(*n*) *Irvine v. Kirkpatrick*, 7 Bell, Sc. Ap. 186, 237.

(*o*) Sug. V. & P. 1; *Knight v. Marjoribanks*, 11 Beav. 348, 2 Mac. & G. 10.

(*p*) Grot. b. 2, c. 12, s. 9.

at theoretical perfection. It does not profess to vindicate every deflection from propriety, but requires men in their dealings with each other to exercise proper vigilance and apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment, and not to close their eyes to the means of information which are accessible to them : *vigilantibus, non dormientibus, jura subveniunt*. If parties are at arms' length, either of them may remain silent and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both, or equally within the reach of their ordinary diligence, and is under no obligation either at law or in equity to draw the attention of the other to circumstances affecting the value of the property in question, although he may know him to be ignorant of them. If, for example, a man treats for the purchase of an estate knowing that there is a mine under the land, and the other party makes no inquiry, the former is not bound to inform him of the fact (*q*). So also a first mortgagee with power of sale, who has made an advantageous contract for the sale of the mortgaged premises, may buy up the interest of a second mortgagee who supposed the property was insufficient to pay off both mortgages, without informing him of the contract (*r*).

A very little, however, is sufficient to affect the application of the principle. If a single word be dropped by a purchaser which tends to mislead the vendor, the principle will not be allowed to operate (*s*). "A single word," said Lord Campbell, in *Walters v. Morgan* (*t*), "or even a nod, or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact which

(*q*) *Fox v. Macreth*, 2 Bro. C. C. 402.

420 ; *Turner v. Harvey*, Jac. 169, 178 ; *Stikeman v. Dawson*, 1 Deg. & S. 90 ; *Laidlow v. Organ*, 2 Wheat. (Amer.), 178 ; *Wilde v. Gibson*, 1 H. L. 605 ; *Walters v. Morgan*, 3 D. F. & J. 723 ; *Archbold v. Lord Howeth*, Ir. L. R. 2 C. L. 608 ; Sug. V. & P. 14th ed. 2, 328, 335.

(*r*) *Dolman v. Nokes*, 22 Beav.

(*s*) *Turner v. Harvey*, Jac. 169, 178 ; *Dolman v. Nokes*, 22 Beav. 402. See *Davies v. Cooper*, 5 M. & C. 270 ; *Blake v. Mowatt*, 21 Beav. 603 ; *Cannock v. Jauncey*, 27 L. J. Ch. 57 ; *Thompson v. Lambert*, I. R. 2 Eq. 439.

(*t*) 3 D. F. & J. 724.

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might influence the price of the subject to be sold, is a fraud at law. So *à fortiori* would a contrivance on the part of the purchaser better informed than the vendor of the real value of the subject to be sold, to hurry the vendor into an agreement without giving him the opportunity of being fully informed of its real value, or time to deliberate and take advice respecting the conditions of the bargain." If a purchaser conceal the fact of the death or dangerous illness of a person of which the seller is ignorant, and by which the value of the property is materially increased, there is fraud (*u*).

A vendor may not, on the other hand, use any art or practise any artifice to conceal defects, or make any representation for the purpose of throwing the buyer off his guard, or use any device to induce the buyer to omit inquiry or examination into the defects of the thing sold. If he says or does anything whatever with an intention to divert the eye or obscure the observation of the buyer even in relation to open defects, or to prevent his use of any present means of observation, there is fraud (*x*). As, for example, where a man having a log of mahogany to sell, turned it over so as to conceal a hole in the underneath side (*y*). So also where a man sold a vessel "with all faults," and before the sale took her from the ways on which she lay and kept her afloat in a dock in order to prevent an examination of her bottom, which he knew to be unsound, the purchaser was held entitled to avoid the sale on account of fraud (*z*).

So also if a vendor were to describe the property as let upon lease under certain specified covenants, beneficial to the reversion, which however he knew could not be enforced, this would probably be considered delusive (*a*). So also if a vendor know-

(*u*) *Turner v. Hurrey*, Jac. 169; *Ellard v. Llandaff*, 1 B. A. & Be. 241; *Jones v. Keene*, 2 Moo. & Rob. 349. See *Popham v. Brooke*, 5 Russ. 9; *Thompson v. Lambert*, 1 R. 2 Eq. 439.

(*x*) *Hill v. Gray*, 1 Stark. 434; *Pillmore v. Hood*, 5 Bing. N. C. 97; *Dobell v. Stevens*, 3 B. & C. 623;

Edwards v. Wickwar, 1 Eq. 68.

(*y*) *Udell v. Atherton*, 7 H. & N. 172.

(*z*) *Baglehole v. Walters*, 3 Camp. 154; *Schneider v. Heath*, ib. 506. See *Pickering v. Dowson*, 4 Taunt. 784; *Kain v. Old*, 2 B. & C. 634; *Taylor v. Bullen*, 5 Exch. 779.

(*a*) *Flint v. Woodin*, 9 Ha. 621.

ing of an incumbrance on an estate sells without disclosing the fact, and with knowledge that the purchaser is a stranger to it, and under representations inducing him to buy, he acts fraudulently and violates integrity and fair dealing (*b*). The same rule applies to the case where a party pays money in ignorance of circumstances with which the receiver is acquainted, and does not disclose, and which, if disclosed, would have prevented the payment. In that case the parties do not deal on equal terms, and the money is held to be unfairly obtained and may be recovered back (*c*). So also although a vendor is in general under no obligation to disclose the price at which he has himself purchased or contracted to purchase the subject of sale (*d*), there may be a fraud upon a purchaser if he misrepresent the price given (*e*).

So also, and upon the same principle, there is fraud, if a man, wishing to advance an undertaking, in which he was interested, determines to purchase shares in it, and another person also interested in the undertaking, takes advantage of the knowledge he possesses of the intention of the former to defeat the particular act, whereby he sought to accomplish his object, and to substitute in the place of it a mode of disposing of a portion of his own interest in the undertaking (*f*).

Mere reticence does not amount to a legal fraud, however it ^{Reticence.} may be viewed by moralists. Either party may be innocently silent as to ground open to both to exercise their judgment upon. If the parties are at arms' length neither of them is under any obligation to call the attention of the opposite party to facts or circumstances which lie properly within his knowledge, although he may see that they are not actually within his knowledge (*g*). But a man may by mere silence, without active concealment, produce a false impression on the mind of

(*b*) 1 Ves. 96, per Lord Hardwicke.

(*c*) *Martin v. Morgan*, 1 Brod & Bing. 289. See *Heane v. Rogers*, 9 B. & C. 577, per Bayley, J.

(*d*) *Ex parte Gover*, 1 Ch. D. 182; *Craig v. Philipps*, 3 Ch. D. 733.

(*e*) *Supra*, p. 48.

(*f*) *Blake v. Mowatt*, 21 Beav. 614.

(*g*) *Archbold v. Lord Howth*, L. R. Ir. 2 C. L. 608. See *Walters v. Morgan*, 3 D. F. & J. 723.

another. *Aliud est celare, aliud tacere ; neque enim id est celare, quicquid reticeas ; sed cum, quod tu scias, id ignorare, emolumenti tui causa, velis eos quorum intersit id scire (h).* Silence implies assent when there is a duty to speak. *Qui tacet consentire videtur : qui potest et debet vetare, jubet (i).* If a man by his silence produces a false impression on the mind of another there is a fraud. "Where," said Lord Blackburn in *Brownlie v. Campbell (j)*, "there is a duty or obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that be done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, there is fraud." If the seller knows the buyer to be acting under a mistake or in ignorance as to some quality or matter connected with the subject of sale, and not to be acting on his own inspection or judgment, and do not undeceive him, the silence of the seller as a means of misleading him may amount to a fraudulent concealment entitling the buyer to avoid the sale (*k*). When, for example, a man employed to sell a picture had refused to state the name of the owner, and afterwards becoming aware that the buyer was under a delusion as to the ownership which enhanced the price, did not remove the delusion, but took advantage of it to effect the sale, it was held that the buyer might avoid the sale on the ground of fraud (*l*).

If a man interested is present and hears any false or imperfect representation made, and does not set it right, he is fixed by the representation (*m*).

When a statement or representation has been made in the *bonâ fide* belief that it is true, and the party who has made it afterwards comes to find out that it is untrue and discovers

(*h*) Cicero de Offic. lib. 3, chap. 12, per Lord Mansfield, 3 Burr. 1910, per Lord Abinger, 6 M. & W. 381 ; *Nelthorpe v. Holgate*, 1 Coll. 221, per Knight Bruce, L. J.

(*i*) *Morgan v. Evans*, 3 Cl. & Fin. 205 ; *Burke v. Prior*, 15 Ir. Ch. 106.

(*j*) 5 App. Ca. 950.

(*k*) *Smith v. Hughes*, L. R. 6 Q. B. 605, per Cockburn, C. J.

(*l*) *Hill v. Gray*, 1 Stark. 434. See *Keetes v. Lord Cadogan*, 10 C. B. 600.

(*m*) *Shepherd v. Sharpe*, 4 L. T. 270 ; *Davies v. Davies*, 6 Jur. N. S. 1322. See *Smith v. Bank of Scotland*, 1 Dow. 272.

what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on upon a statement which was honestly made at the time it was made, but which he has not retracted when he has become aware that it can no longer be honestly persevered in (*n*).

When the purchasers of an estate, being the owners of an adjoining colliery, in negotiating the contract had not disclosed the fact that they had already worked a considerable quantity of coal from under the estate through their colliery, it was held that the vendor was entitled to have the contract set aside (*o*). "If a man," said Lord Hatherley (*p*), "knows that he has committed a trespass of a very serious character upon his neighbour's property, and finding it convenient to screen himself from the consequences makes a proposal for the purchase of that property, he ought to communicate to the person with whom he is dealing the exact circumstances of the case. . . . The proposal which he makes is not in reality a simple proposal for purchase of the property; it involves a buying up of rights which the owner has acquired against him, and of which the owner is not aware. . . . for according to the principle of *Martin v. Porter*, the vendors are entitled to be paid for the coal wrongly severed a sum much greater than its value while ungotten."

A vendor is by the civil law bound to warrant the thing he sells or conveys, albeit there be no express warranty; but the common law binds him not, unless there be a warranty either in deed or law. *Caveat emptor* is the ordinary rule of the common law (*q*). If the defects in the subject matter of sale are patent, or such as might and should be discovered by the exercise of ordinary vigilance, and the buyer has an opportunity of inspecting it, the law does not require the seller to aid and assist the observation of the purchaser. Even a warranty will not cover defects that are plainly the objects of sense (*r*). Defects, how-

No duty to disclose patent faults.

(*n*) *Brownlie v. Campbell*, 5 App. Ca. 950, per Lord Blackburn.

(*p*) *Ib.* 779.

(*o*) *Philippa v. Homfray*, 6 Ch. 770.

(*q*) Co. Litt. 102 a, Hob. 99, Broom, Leg. Max. 768.

(*r*) *Dyer v. Harygrave*, 10 Ves. 507;

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Duty to disclose
latent faults,
&c.

ever, which are latent (*s*), or circumstances materially affecting the subject matter of sale of which the purchaser has no means, or at least has not equal means, of obtaining knowledge, must, if known to the seller, be disclosed. Where, for instance, particulars of sale described the subject of sale as a certain interest, if any, the vendor knowing at the time that it was of no value, whereas the purchaser had no means of ascertaining whether it was of any value or not, the transaction was held fraudulent (*t*). So also on the sale of a ship, which had a latent defect known to the seller, and which the buyer could not by any attention possibly discover, the seller was held bound to disclose it (*u*). So also where a man sold an estate to another knowing or having reason to know at the time, but concealing the fact that part of the land was an encroachment upon a common to which he had no title, the sale was set aside as having been effected by fraud (*x*). So also where a lessor of a mine did not disclose the fact that a material portion of the mine was under land between high and low water mark, to which he had no title, it was held a sufficient ground to set aside the lease at the suit of the lessee, who had no means of knowing the defect (*y*). So also if one of the parties to a transaction knows that the solicitor of the other party has not disclosed to him some matter of a material nature, the concealment may be fraudulent (*z*). So also if a creditor compounds with his debtor under a false impression in which the debtor knowingly leaves him as to the extent of the debtor's estates, there is a fraud (*a*).

A vendor, however, is not bound to state that the property has been recently valued at a sum greatly less than the intended purchaser's money, or that the tenant has complained of the rent as being excessive (*b*).

Grant v. Munt, Coop. 173; *Margetson v. Wright*, 7 Bing. 603; *Jennings v. Broughton*, 5 D. M. & G. 131; *Horsfall v. Thomas*, 1 H. & C. 100.

(*s*) *Mellish v. Motteur*, Peake, 156.

(*t*) *Smith v. Harrison*, 26 L. J. Ch. 412.

(*u*) *Mellish v. Motteur*, Peake, 156.

(*x*) *Edwards v. McCleay*, 2 Sw.

287.

(*y*) *Mostyn v. West Mostyn Coll. Co.*, 1 C. P. D. 145.

(*z*) *Solomon v. Honeywood*, 12 W. R. 572.

(*a*) *Vine v. Mitchell*, 1 Mood. & Rob. 337.

(*b*) *Abbott v. Sworder*, 4 Deg. & S. 448, 460.

A vendor may, on the sale of chattels, expressly stipulate that the buyer is to take the chattels "with all faults." In such case it is immaterial how many faults there are within his knowledge; but he may not use any artifice to disguise them, or to prevent the buyer from discovering them (*c*). So also where animals are sold in a market "with all faults," and it is expressly stated that no warranty will be given, there is no representation by the vendor that they are in the belief of the vendor free from disease; but if he goes on expressly to say in addition that so far as he knows or believes, or has reason to believe, that the animals are free from disease, and it can be afterwards proved that to his knowledge the animals were diseased, there is a fraudulent representation (*d*).

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Chattels sold
"with all
faults."

But the chattel must answer the description and the circumstances under which it is sold; thus the sale of a vessel described as "copper fastened" to be taken "with all faults, without allowance for any defect whatsoever," was construed to mean only such defects as were consistent with the description, and not to exclude a misdescription in the vessel not being "copper fastened," which was held to be warranted (*e*).

Where, however, a vessel was sold under the description of "teak-built A 1," and to be taken "with all faults, and without any allowance for any defect or error," the additional stipulation against "error" was held to extend to errors of description, and the seller was not responsible for the ship not being as described (*f*).

If the defects are of such a nature that they cannot be discovered by any attention whatever on the part of the purchaser, the insertion of the condition will not excuse the vendor from disclosing the faults within his knowledge (*g*).

A purchaser may by express contract to take the property with the risk of error in the particulars of sale debar himself from complaining afterwards of error in the particulars. In a

(*c*) *Baglehole v. Walters*, 3 Camp. 240.

154; *Schneider v. Heath*, ib. 506, supra, p. 62.

(*d*) *Ward v. Hobbs*, 4 App. Ca. 13.

(*e*) *Shepherd v. Kain*, 5 B. & Ald.

(*f*) *Taylor v. Bullen*, 5 Exch. 779.

(*g*) Sug. V. & P. 333.

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case accordingly where it was expressly stated that the purchaser shall take the property with all risk of error in the particulars, and a representation is made which is true according to the knowledge and belief of him who makes it, any error is covered by the express contract of the purchaser to take the property with the risk of error in the particulars (*h*).

Caveat emptor.

The maxim *caveat emptor* applies with certain specific restrictions and qualifications, both to the title and quality of the subject matter of sale. In the case of real estate the vendor must produce to the purchaser all documents of title in his possession or power, and give information of all material facts not apparent thereon (*i*). Any charge upon the estate, or right restrictive of the purchaser's absolute enjoyment of it, and the release of which cannot be procured by the vendors, should be stated ; or the omission may, in many cases, render the sale voidable by the purchaser (*k*) ; *e.g.*, a right of sporting over the estate (*l*), a right of common every third year (*m*), a right to dig for mines (*n*), a liability to repair the church chancel (*o*), or any other right or liability which cannot fairly admit of compensation (*p*), or would render the estate different in substance from what the purchaser was justified in believing it to be (*q*), would, if undisclosed, have that effect (*r*).

Disclosure on
sale of real
estate.

A vendor need not, however, direct attention to defects, &c., apparent on the title-deeds (*s*), or to any matter of which the purchaser has actual or constructive notice (*t*). But if the seller be informed by the purchaser of his object in buying, and the lease contains covenants which defeat that object, mere silence is fraudulent concealment (*u*). If there has been no fraudulent concealment on the part of the seller, but the title turns out to

(*h*) *Brownlie v. Campbell*, 5 App. Ca. 931.

(*i*) *Edwards v. McCleay*, Coop. 308 ; Dart, V. & P. 95.

(*k*) Dart, V. & P. 116.

(*l*) *Burnell v. Brown*, 1 J. & W. 172.

(*m*) *Gibson v. Spurrer*, Pea. Ad. C. 50.

(*n*) *Seaman v. Fordrey*, 16 Ves. 390.

(*o*) *Forteblow v. Shirley*, cited 2 Sw. 223.

(*p*) Dart, V. & P. 116.

(*q*) *Supra*, pp. 22—24.

(*r*) See, further, Dart, V. & P. 117, 118.

(*s*) Sug. V. & P. 8.

(*t*) Dart, V. & P. 95, 119.

(*u*) *Flight v. Barton*, 3 M. & K. 282.

be defective, the rule *caveat emptor* applies, and the purchaser has no remedy, unless he take a special covenant or warranty (*x*). A seller selling in good faith, is not responsible for the goodness of the title beyond the extent of his covenants (*y*).

There is no implied warranty on a demise of real or leasehold property, that it is fit for the purposes for which it is taken (*z*). The purchaser takes the risk of its quality and condition, unless he protects himself by an express agreement on the subject (*u*). But in the letting of a furnished house there is an implied condition that it shall be in a good and tenantable condition, and reasonably fit for human occupation from the day on which the tenancy is to begin (*b*). There is, however, no implied duty cast on the owner of a house in a ruinous and unsafe condition to inform a proposed tenant, that it is unfit for habitation, nor will an action of deceit lie against him for omitting to disclose the fact (*c*); but a seller must not, during a treaty for, or while intending a sale, endeavour to conceal a defect, or to divert a purchaser's attention from it (*d*).

In the case of a sale of goods and chattels, the rule *caveat emptor* applies to the title, unless the seller knows that he has no title and conceals the fact, or unless the surrounding circumstances of the case are such that a warranty may be implied (*e*). In the ordinary case, for instance, of the sale of goods in a shop, there is a warranty of title, for the seller, by the very act of selling, holds himself out to the buyer that he is the owner of the articles he offers for sale (*f*). If, however, the surrounding circumstances are such that the seller must be taken to be merely

Caveat emptor in the case of a sale of goods.

(*x*) *Parkinson v. Lee*, 2 East, 323, per Lawrence, J.; *Stephens v. Medina*, 4 Q. B. 428, Broom, Leg. Max. 773.

(*y*) See *Bree v. Holbech*, Dougl. 655.

(*z*) *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, 12 M. & W. 68; *Keates v. Cadogan*, 10 C. B. 591; *Chappell v. Gregory*, 34 Beav. 259.

(*u*) *Izon v. Gorton*, 5 Bing. N. C. 501; *Surplice v. Farnsworth*, 7 M. &

G. 576.

(*b*) *Smith v. Marrable*, 11 M. & W. 5; *Wilson v. Finch Hatton*, 2 Exch. D. 336.

(*c*) *Keates v. Cadogan*, 10 C. B. 591.

(*d*) Dart, V. & P. 92.

(*e*) *Morley v. Attenborough*, 3 Exch. 500; *Hall v. Conder*, 2 C. B. N. S. 40; *Eichholtz v. Bannister*, 17 C. B. N. S. 708.

(*f*) *Eichholtz v. Bannister*, 17 C. B. N. S. 708.

selling such a title as he has himself in the goods, the maxim applies, and there is no warranty of title (*g*).

When, for example, a pawnbroker sold an article by auction as a forfeited pledge he was held to affirm only that the article had been pledged to him and was irredeemable and his warranty was limited to that effect (*h*). So also a sale of goods seized under an execution was held to import no warranty of title (*i*).

The question as to the application of the maxim *caveat emptor* on the sale of goods in respect to the quality of the goods, was very fully considered by the Court of Queen's Bench in *Jones v. Just* (*k*). The cases on the subject were distinguished as falling under five different heads.

"1stly. Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect is latent, and not discoverable on examination, at least where the seller is neither the manufacturer nor the grower (*l*). The buyer, in such case, has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality, or are merchantable (*m*).

"2ndly. Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty (*n*).

"3rdly. Where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known described and defined thing be actually supplied, there is no war-

(*g*) *Morley v. Attenborough*, 3 Exch. 500; *Hall v. Conder*, 2 C. B. N. S. 22; *Sims v. Marryatt*, 17 Q. B. 291; *Baguley v. Hawley*, L. R. 2 C. P. 629.

(*h*) *Morley v. Attenborough*, 3 Exch. 500.

(*i*) *Chapman v. Speller*, 14 Q. B. 621.

(*k*) L. R. 3 Q. B. 197, 202.

(*l*) *Parkinson v. Lee*, 2 East, 314.

(*m*) *Emmerton v. Matthews*, 7 H.

& N. 586, 31 L. J. Exch. 139.

(*n*) *Barr v. Gibson*, 3 M. & W. 390.

ranty that it shall answer the particular purpose intended by the buyer (o).

"4thly. Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied (p). In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

"5thly. Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article (q). So, also, on a sale by a merchant to a merchant or dealer who has had no opportunity of inspection, there is an implied warranty that the article shall be reasonably fit for the purpose for which it is supplied (r). In every contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specific description, but must also be saleable and merchantable under that description" (s).

On the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought, though it does not possess that quality. Even if the vendor was aware that the purchaser thought the article possessed that quality and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him,

(o) *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *Wilson v. Dunville*, 4 L. R. 1. 256.

(p) *Brown v. Edgington*, 2 M. & G. 279; *Jones v. Wright*, 5 Bing. 533; *Randall v. Newson*, 2 Q. B. D. 102.

(q) *Laing v. Fidgeon*, 4 Camp. 169; 6 Taunt. 108; *Shepherd v. Pybus*, 3 M & G. 868.

(r) *Bigge v. Parkinson*, 7 H. & N. 955, 31 L. J. Exch. 301.

(s) *Jones v. Just*, L. R. 3 Q. B. 197.

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and a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit, for whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor. When a specific lot of goods is sold by sample which the purchaser inspects instead of the bulk, the law is exactly the same if the sample truly represents the bulk (*t*). In the sale of goods by sample, the vendor warrants the quality of the bulk to be equal to that of the sample (*u*): but the sample must be free from any secret defect of manufacture, not discoverable on inspection and unknown to both parties (*x*). When goods are sold by sample, the implied warranty of merchantable quality is excluded only with respect to such matter as could be judged of by the sample (*y*).

Caveat emptor
in case of sale
of shares.

The rule *caveat emptor* renders it lawful for a man holding shares in an insolvent company to sell them to any one willing to buy them, and in the absence of misrepresentation by the seller, the buyer is apparently without any remedy against him (*z*).

Omission of
purchaser to dis-
close insolvency.

The mere omission of a purchaser of property to disclose his insolvency to the vendor, is not a fraud for which the sale may be avoided. If no inquiries are made, and the vendee makes no false statements, nor resorts to any artifice or contrivance for the purpose of misleading the vendor, it is not in general fraudulent in him to remain silent as to his pecuniary condition (*a*).

An honest though abortive purpose to continue in business and pay for the goods, is consistent with the vendee's knowledge of his own insolvency. But there may be circumstances under which the concealment of a material and sudden change in the circumstances of a purchaser which he has reason to suppose to be unknown to a vendor, may amount to a fraud (*b*).

(*t*) *Smith v. Hughes*, L. R. 6 Q. B. 607, *per* Lord Blackburn.

(*u*) *Parker v. Palmer*, 4 B. & Ald. 387.

(*x*) *Heilbuth v. Hickson*, L. R. 7 C. P. 438.

(*y*) *Mody v. Gray*, *ib.*, 4 Exch. 52.

(*z*) See *Remfrey v. Butler*, El., Bl.,

& El. 887; *Stray v. Russell*, 1 El. & El. 888.

(*a*) *Ex parte Whittaker*, 10 Ch. 449.

(*b*) *Nichols v. Pinner*, 4 Smith (Amer.), 295; *Brown v. Montgomery*, 6 Smith (Amer.), 287; *Talcott v. Henderson*, 27 Amer. R. 501.

A dealer, for instance, who has been of known standing, but has suddenly failed in business, cannot go to those who were acquainted with his former position, but have not heard of his failure, and innocently purchase property on credit (*c*). So, also, there is fraud if a vendee obtain goods upon credit, with a pre-conceived fraudulent design not to pay for them (*d*).

The same rules as to false and deceptive statements, which are applicable to contracts between individuals, are also applicable to contracts between an individual and a company. No misstatement or concealment of any material fact or circumstances ought to be permitted in a prospectus to invite persons to become shareholders in a projected company. The public who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character, as the promoters themselves possess. The promoters of companies, who invite persons to take shares on the faith of representations contained in prospectuses, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as a fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any way affect the nature, or extent, or quality of the privilege or advantage which the prospectus holds out as an inducement to take shares. It cannot be too strongly impressed upon those who, having projected an undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterise their published statements (*e*). It is not merely by one or two statements in the prospectus which are not borne out by the facts, that the matter ought to be tried, but by the combined effect of them all, pro-

Misrepresentation and concealment by companies.

(*c*) *Brown v. Montgomery*, 6 Smith (Amer.), 287.

(*d*) *Noble v. Adams*, 7 Taunt. 59; *Load v. Green*, 15 M. & W. 216; *Ex parte Whittaker*, 10 Ch. 449, *per Mellish*, L. J.

(*e*) *New Brunswick, &c., Railway*

Co. v. Muggeridge, 1 Dr. & Sm. 381, 382; *Re Reese River Silver Mining Co.*, *Smith's Case*, 2 Ch. 609; *Central Railway Co. of Venezuela v. Kisch*, 2 E. & L. App. Ca. 113, 114; *Baynall v. Carlton*, 6 Ch. D. 383.

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ducing a result which would have misled any person who took shares on the faith of the prospectus (*f*). Though certain statements or suppressions standing alone, might not be sufficient ground to give a man a right to have a transaction set aside, yet another part of the case may lead to a different conclusion, and reflect upon the general fairness of the prospectus, even in those particulars (*g*).

There is a material distinction between the employment of words in a prospectus which can only bear one meaning and of those which are equivocal and which different persons may interpret differently. In the latter case no prudent person would act upon his own construction without some inquiry. In construing a prospectus the preliminary character of the document must always be taken into consideration. A prospectus is intended to usher a company into existence and not to describe its actual formation. This ought always to be borne in mind when a construction is required to be put upon the language of a prospectus, and—unless it distinctly points to what is actually existing at the time, it must be taken to represent what will be the state of things when the company is completely formed (*h*).

If persons publishing a prospectus use such careless language that their statements literally read are untrue, although this literal sense is different from what they intended, this amounts to a misrepresentation for which they may be liable to any one who is deceived or misled by it (*i*).

The absence of any intention to deceive will not relieve directors of a company who have concealed a material fact in the prospectus of a company from the consequences. If the fact is material, and one which ought to have been disclosed, it is immaterial that the directors may have had a sincere and honest belief in the probable success of the company. The concealment is in law a false representation, and the belief of the directors who make the representation, and by so doing induce a man to take shares in the company, that the concern will be a

(*f*) *Central Railway Co. of Venezuela v. Kisch*, 2 E. & I. App. Ca. 125.

(*g*) *Ib.* 117.

(*h*) *Hallows v. Fernie*, 3 Ch. 475.

(*i*) *Ib.* 476.

successful one, will not exonerate them from their liability to indemnify any person who takes shares from the company on the faith of the prospectus against any loss which may be occasioned to him by reason of such concealment (*k*).

If a person purchases shares in a company upon the faith of a prospectus, and is referred to any document which will show the untruth or inaccuracy of any of its statements, and chooses not to make use of his means of knowledge, but to continue in a state of wilful ignorance of the facts, he cannot afterwards be heard to complain that he has been deceived by the alleged misstatements (*l*). In considering, moreover, the question of knowledge or means of knowledge of a person, it is important to see whether he was a person likely, through inexperience, to be misled by a prospectus, or to place implicit reliance upon all it contains (*m*). Where the prospectus of a company contained a material misrepresentation, at the same time stating that reports and plans might be inspected and further information obtained at the office of the company, it was held that the neglect of a shareholder to use these means was no answer to his claim to be relieved from the contract (*n*).

If it appear that the authors of the prospectus have engaged in a transaction by which the funds of the company were to be applied to a purpose not disclosed by the prospectus, and which they had a direct interest in concealing from those who are invited to embark in the undertaking, and to whom it is most material that they should know the whole truth respecting the engagement, there is a departure from that good faith which courts of justice require (*o*). So, also, where the prospectus of a company issued for the purpose of inducing persons to take shares, and stating the object of the company to be to purchase the business of a firm without disclosing the fact that the firm was then insolvent, it was held to be fraudulent as against persons contracting to take shares in the company (*p*).

(*k*) *Peek v. Gurney*, 13 Eq. 79.

(*o*) *Bagnall v. Carlton*, 6 Ch. D.

(*l*) *Hallows v. Fernie*, 3 Ch. 477. 384.

(*m*) *Ib.*

(*p*) *Oakes v. Turquand*, 2 E. & I.

(*n*) *Central Railway of Venezuela*
v. *Kisch*, 2 E. & I. App. Ca. 99.

App. Ca. 326; *Peek v. Gurney*, 6 E.
& I. App. Ca. 377.

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When the objects of a company, as set out in the memorandum of association, go far beyond what was indicated in the prospectus, on the faith of which a man applied for and obtained shares, he is, unless barred by laches or acquiescence, entitled, on discovering the difference, to have his name removed from the list of shareholders of the company (*q*). A mere difference in the language of the prospectus and the memorandum will not relieve him from his liability. The question would be whether the obligations incurred under the two documents were substantially different (*r*).

Materiality of false representation in prospectus.

A prospectus stating that more than half the proposed capital had been subscribed for, when, in fact, it had been merely agreed to be subscribed by an agent of the company under an arrangement that it should be allotted to future applicants without any liability on his part, was held to be a fraudulent representation entitling an allottee to repudiate his shares (*s*). So, also, a prospectus of a company stating the object to be to construct a railway under a concession granted by a foreign state without disclosing the fact that the concession was in fact to be purchased from other parties for a large sum in reduction of the stated capital of the company, was held to be fraudulent; and the same prospectus was held to be fraudulent in stating contrary to the fact, that a contract had been made for the required works "at a price considerably within the available capital" (*t*).

So, also, a representation in a prospectus that the directors had taken a large number of shares, or that a certain number of shares or a certain amount had been subscribed for, is, if false, a material misrepresentation, and entitles an allottee of shares to rescind his contract (*u*). So, also, a statement in a prospectus of a company that certain persons have agreed to become directors, may be, if false, a material misrepresentation (*x*). On

(*q*) *Downes v. Ship*, 3 E. & I. App. Ca. 343.

(*r*) *Ib.*

(*s*) *Ross v. Estates Investment Co.*, 3 Ch. 682.

(*t*) *Central Railway of Venezuela v. Kisch*, 2 E. & I. App. Ca. 99.

(*u*) *Kent v. Freehold Land, &c., Co.* 4 Eq. 599, 3 Ch. 493; *Henderson v. Lacon*, 5 Eq. 257. See *Moore and De la Torre's Case*, 18 Eq. 661.

(*x*) *Blake's Case*, 34 Beav. 642; *Anderson's Case*, 17 Ch. D. 373. See *Hallows v. Fernie*, 3 Ch. 472.

the other hand, the non-disclosure of the fact that a contractor of the company had agreed to give a director of the company a large amount of paid-up shares, was held to be not material (*y*). So, also, the non-disclosure in the prospectus of a proposed company of the fact that the directors had allotted to themselves a large number of shares, and that they had entered into an arrangement with an engineer, which, as alleged, was very beneficial to him but detrimental to the company, was held to be immaterial to the contract of a person who was induced by the prospectus to apply for shares (*z*).

The Companies Act, 1867, 30 & 31 Vict. c. 131, s. 38, enacts Companies Act, 1867, s. 38. that every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof before the issue of such prospectus or notice, whether subject to adoption by the directors, or the company, or otherwise; and that any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company, knowingly issuing the same, as regards any persons taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract (*a*).

There has been much difference of opinion among judges as to the meaning of the language of the section. Lord Bramwell is of opinion that the contracts therein mentioned must be limited to those which bind the company, or which may be adopted or assumed by the company, and so affect it when formed, and that if it was intended that intending shareholders should be guided by information given in the prospectus as to the previous history of the company, its promoters, and the subject of its intended operations, no reason can be given why contracts only were to be stated (*b*). Lord Blackburn and Lord Justice Baggallay are of opinion that all contracts which would

(*y*) *Heyman v. European Central Railway Co.*, 7 Eq. 154.

(*z*) *Putsford v. Richards*, 17 Beav. 87.

(*a*) See *Arkwright v. Newbold*, 17 Ch. D. 302.

(*b*) *Sullivan v. Mitcalfe*, 5 C. P. D. 455.

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assist a person in determining whether he would become a shareholder, though not subject to adoption by the directors of the company, come within the description of contracts therein specified (c). Chief Justice Cockburn was of opinion that the clause was intended to protect the shareholder against the deceptions too often practised in the creation of companies by insuring him full information as to all the material circumstances attending the formation of the company he is invited to join antecedently to the issuing of the prospectus (d). Lord Justice Thesiger was of opinion that every contract relative to the formation of the company, or to its capital, property, or business when formed, or to the position, pecuniary or otherwise, in regard to the company or its promoters or vendor, of the directors or other officers of the company, and which is material to be made known to persons invited to take shares in order to enable them to form a judgment as to the policy of so doing, is a contract within the meaning of sect. 38, and as such must be disclosed under the circumstances and to the extent which the section points out, provided that one of the parties to it is at its date or subsequently becomes a promoter, director, or trustee of the company (e). Chief Baron Kelly was of opinion that a contract to be within the meaning of the clause must have been made with the company if it has been formed, and, if not, with the promoters or directors, or the trustees representing or purporting to act on behalf of the future company, and with the intent that the company, when formed, shall execute a corresponding contract, and so in effect ratify the act done by the promoters or other body of persons mentioned before its formation; that it must also be such as to impose or be intended to impose a burden, or obligation, or a loss, or a liability upon the company which would affect the value of the shares in the hands of a purchaser. It seemed to him likewise that no contract between one promoter and another or by and between any person or persons, and to which neither the company nor one of the three bodies of persons mentioned in the clause are

(c) *Ib.*; *Charlton v. Hay*, 31 L. T. 469.

N. S. 437.

(e) *Sullivan v. Mitcalfe*, 5 C. P.

(d) *Twycross v. Grant*, 2 C. P. D. 455.

parties can be brought within its operation (*f*). Lord Justice Brett is of opinion that the clause was intended to insure the disclosure of anything which might reasonably have an effect on the mind of an intended subscriber for shares as to whether he should trust the representations made to him and become a shareholder. Lord Coleridge and Lord Justice Lindley are of opinion that all contracts must be disclosed which are calculated to influence persons reading a prospectus in making up their minds whether or not they will apply for shares in it; and that any construction of the Act which would exclude from its operation a contract entered into by a promoter before the prospectus was published, and affecting his own payment out of the funds of the company, or the property of the company, or the manipulation of its shares, or the independence of its directors would be too narrow a construction, and ought not to be adopted (*g*).

In *Sullivan v. Metcalfe* (*h*), B. and C. being possessed of a patent, agreed to sell it for 56,000*l.*, but, by a series of contracts, it was arranged that only 2,000*l.* out of that sum should be retained by them for their own use, and that 54,000*l.* should be divided between the promoters of the company. The prospectus issued on behalf of the company did not mention the contracts relating to the disposal of the purchase-money of the patent. The defendants were promoters and directors of the company. The plaintiff subscribed for shares, but he afterwards sued defendants to recover the price of the shares subscribed for by him. It was held upon demurrer by Lords Justices Baggallay and Thesiger (Lord Bramwell dissenting) that the contracts as to the disposal of the purchase-money of the patent ought to have been specified in the prospectus pursuant to sect. 38, and that the defendants were liable to the plaintiff for the price of his shares. So, also, in *Jury v. Stoker* (*i*), J. being owner of mills in Cork subject to a mortgage for 3,000*l.*, and indebted to a bank for 5,000*l.*, with a view of forming a company to purchase

(*f*) *Twycross v. Grant*, 2 C. P. D. I. 397.

469.

(*h*) 5 C. P. D. 456.

(*g*) *Ib.* See *Jury v. Stoker*, 9 L. R.

(*i*) 9 L. R. I. 397.

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and carry on the business of mills, contracted with S. and another, merchants of influence and position, to allow their names to be put forward as directors in consideration of 150 paid-up shares of the company to S. and 100 to the other. A deed was executed between trustees for the bank (who had agreed to purchase the mortgage), J. and S. and C. as trustees for the projected company, whereby the trustees for the bank agreed to sell and convey the mill premises to the company when formed for 8,000*l.* to be paid by debentures of the company, and that J., on the formation of the company, should assign to it all his stock in trade, book debts, &c., and all his interest in the mill premises in consideration of 2,500 paid-up shares of 5*l.* each. The company was formed, and J. and S. were two of the directors, and the articles of association declared the above agreement binding on the company, and directed the allotment of 2,500 paid-up shares to J. for the purchase of the goodwill and stock in trade. The prospectus stated that the company had acquired "the very valuable concern—viz., the mill premises, goodwill, &c.—on exceptionally favourable terms—viz., for the small sum of 8,000*l.* payable in debentures, &c., and 1,000 paid-up shares, in addition to which the vendor will purchase 1,500 shares fully paid-up, thus putting a cash capital of 7,500*l.* into the concern." The company being wound up, an action was brought by a shareholder against J. and S. for damages for a false representation in the prospectus as to the capital of the company, and for the suppression of the contract between J. and S., under which S. became a director; and it was held that the suppression was fraudulent under sect. 38. Sir Edward Sullivan, M.R., agreed with Lords Justices Baggallay and Thesiger as to the construction of sect. 38, and said: "The contract here made was between Stoker, who assumed the character of a trustee for the company, and Jackson, who was the real promoter of the company. I entertain no doubt that the plaintiff knew nothing of that contract, and as little doubt that, if he had known Stoker had got 750*l.* for allowing himself to be named as director of the company, he would have hesitated before he advanced his money in a concern which could bring nothing but danger and loss to him. But that is not the point.

The question is, was this contract a thing which a man who was about to subscribe his money to the concern ought to have known? I am clearly of opinion that it was, and that this was a contract within sect. 38."

The omission in the prospectus of a company of a contract which the promoter of the company had entered into before he became a promoter, is not fraudulent within the meaning of sect. 38 (*k*). Where, accordingly, a man agreed with the owner of a patent to purchase the patent for a certain sum to be paid partly in cash and partly in the shares of the company to be formed by him; and, three months afterwards, he made an agreement with a trustee for an intended company to sell the patent for a much larger sum of money than he had given for it, to be paid partly in cash and partly in shares of the company, and a company was afterwards formed, he being a director,—it was held that when he made the agreement to purchase the patent he was not a promoter of the company, and that the omission of that agreement in the prospectus of the company was not a fraudulent one (*l*). "No impropriety in the contract," said Lord Justice James, "can make it the contract of the company or the contract of a promoter, trustee, or director of a company, when, at the date of the contract, there was no company, no promoter, no trustee, no director. The character of the contract cannot operate as a transformation of the contracting parties" (*m*).

The words "knowingly issuing" in sect. 38, mean intentionally issuing a prospectus without inserting the contracts which are required by the section to be specified, although they are omitted under the *bonâ fide* belief that it is unnecessary to specify them (*n*).

Sect. 38 is only for the protection of shareholders, and does not extend to bondholders. The section amounts simply to a provision that, as between certain parties, a prospectus which does not reveal a certain class of contracts shall be deemed fraudulent (*o*).

Those who, having a duty to perform, represent to those who

Misrepresentation by parties

(*k*) *Ex parte Gover*, 1 Ch. D. 182; (*n*) *Tuttycross v. Grant*, 2 C. P. D. 469.
Craig v. Philipps, 3 Ch. D. 733.

(*l*) *Ex parte Gover*, 1 Ch. D. 182. (*o*) *Cornell v. Hay*, L. R. 8 C. P.

(*m*) *Ib.* 328.

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having a duty to
perform.

Misrepresenta-
tion by agent
binding on the
principal.

are interested in the performance of it, that it has been performed, make themselves responsible for all the consequences of the non-performance (*p*).

The false and fraudulent representations of an agent, when acting within the scope of his authority, bind the principal (*q*). A man cannot take any benefit under false and fraudulent representation made by his agent, although he may have been no party to the representations, and may not have distinctly authorised them (*r*).

He cannot adopt and take the benefit of a contract entered into by his agent, and repudiate the fraud on which it was built. If the agent at the time of the contract makes any representation or declaration touching the subject-matter, it is the representation and declaration of the principal. The statements of the agent which are involved in the contract, as its foundation or inducement, are in law the statements of the principal. The principal cannot separate the contract itself from that by which it was induced. He must adopt the whole contract, including the statements and representations which induced it, or must repudiate the contract altogether (*s*). It would be inconsistent with natural justice, to permit a man to retain property acquired through the medium of false representations made by his agent, although he was no party to them, or did not authorise them (*t*). If an agent employs another person to make representations, it is the same as if the representations had been made by him (*u*).

(*p*) *Blair v. Bromley*, 2 Ph. 360,
per Lord Cottenham.

(*q*) *Wilson v. Fuller*, 3 Q. B. 77 ;
Blair v. Bromley, 2 Ph. 350 ; *Cole-*
man v. Riches, 16 C. B. 104 ; *Wheel-*
ton v. Harlisty, 8 E. & B. 232, 260 ;
Udell v. Atherton, 7 H. & N. 173.

(*r*) *Nicoll's Case*, 3 D. & J. 387,
437, *per* Turner, L. J. ; *Udell v.*
Atherton, 7 H. & N. 172, *per* Pollock,
C. B., & Wilde, J. ; *New Brunswick*
&c., Railway Co. v. Conybeare, 9 H. L.
714, 726, *per* Lord Westbury, *ib.*
739, *per* Lord Cranworth ; *Mackay*
v. Commercial Bank of New Bruns-

wick, L. R. 5 P. C. 410.

(*s*) *Udell v. Atherton*, 7 H. & N.
184, *per* Pollock, C. B., & Wilde, B. ;
Ex parte Ginger, 5 Ir. Ch. 174 ; *Bar-*
wick v. English Joint Stock Bank, L.
R. 2 Exch. 265 ; *Weir v. Bell*, 3
Exch. D. 244 ; *Mullens v. Miller*, 22
Ch. D. 194.

(*t*) *New Brunswick, &c., Co. v.*
Conybeare, 9 H. L. 711 ; *Western*
Bank of Scotland v. Addie, 1 Sc.
App. Ca. 159 ; *Oakes v. Turquand*, 2
E. & I. App. Ca. 325.

(*u*) *Western Bank of Scotland v.*
Addie, 1 Sc. App. Ca. 159.

In *Cornfoot v. Fowke* (x), a man had employed an agent for the sale of property, who in the course of the treaty for sale made material representations respecting the property which he honestly believed to be true, though they were false in fact and false to the knowledge of the principal; there being, however, no evidence to show a fraudulent purpose on the part of the principal, it was held that fraud and covin could not be pleaded in bar to an action by him on the contract. Lord Abinger differed from the majority of the Court, being of opinion that if a principal employs an agent to sell property, and such agent in the course of his employment makes false representations respecting the property, he cannot take advantage of a contract induced by such representations, whether the agent was authorised by him or not to make the representations.

Cornfoot v. Fowke has been the subject of much comment. It has been explained by Lord Cranworth in *National Exchange Company v. Drew* (y), and *Bartlett v. Salmon* (z), and by Willes, J., in *Barwick v. English Joint Stock Bank* (a), as having turned on a point of pleading. Lord St. Leonards in *National Exchange Company v. Drew* (b), and Lord Campbell in *Wheelton v. Hardisty* (c), expressed their disapproval of it: and from the manner in which it was treated in *Mackay v. Commercial Bank of New Brunswick* (d), *Weir v. Bell* (e), and *Houldsworth v. City of Glasgow Bank* (f), it can no longer be considered as law (g).

A partnership firm is bound by false and fraudulent representations made by any of its members whilst acting within the scope and limits of his authority, and having reference to the proper business of the firm (h), but is not bound by statements made by him as to his authority to do that which the nature of the business of the firm does not impliedly warrant (i).

Partnership firm bound by representations of a partner.

(x) 6 M. & W. 358.

(y) 2 Macq. 108.

(z) 6 D. M. & G. 39.

(a) L. R. 2 Exch. 262.

(b) 2 Macq. 144.

(c) 8 E. & B. 270.

(d) L. R. 5 P. C. 394.

(e) 3 Exch. D. 244.

(f) 5 App. Ca. 326.

(g) See *Mullens v. Miller*, 22 Ch. D. 194.

(h) *Rapp v. Latham*, 2 B. & Ald. 795; *Locell v. Hicks*, 2 Y. & C. 46, 481; *Blair v. Bromley*, 5 Ha. 557, 2 Ph. 354; *Wickham v. Wickham*, 2 K. & J. 478.

(i) *Ex parte Agace*, 2 Cox, 312.

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Companies and corporations bound by misrepresentation of agents.

A company or corporation is as much bound by the false and fraudulent representations of its authorised agents as an individual. If the directors or agents of a company or corporation in the course of managing its affairs, or in the course of the business which it is their duty to transact, induce a man by false or fraudulent misrepresentations to enter into a contract for the benefit of the company, the company is bound, and can no more repudiate the fraudulent conduct of its agents than an individual can (*k*). A company or corporation cannot retain any benefit which it may have obtained through the fraudulent representations of its agents, but is responsible to the extent to which it may have profited from such representations (*l*).

The rule that a company cannot retain any benefit which it may have obtained through the false and fraudulent representations of its agents, applies to the case of a member of the company, who was induced by such representations to take additional shares (*m*).

Principal not bound by representations of agents, unless they be acting within the scope of their authority.

A principal, however, is not bound by the false and fraudulent representations of his agent, unless the agent be acting within the scope of his authority (*n*). A joint-stock company, for instance, is not bound by the statements of one of its members, unless he is also the agent of the company, and unless his business be to make statements on its behalf (*o*). Nor is a company bound by the statements of one of the

(*k*) *Burnes v. Pennell*, 2 H. L. 497; *Ranger v. Great Western Railway Co.*, 5 H. L. 86; *National Exchange Co. v. Drew*, 2 Macq. 125, per Lord Cranworth; *Mene Executors' Case*, 2 D. M. & G. 522; *Nicoll's Case*, 3 D. & J. 387, 437; *New Brunswick, &c., Railway Co. v. Conybeare*, 9 H. L. 737, per Lord Cranworth.

(*l*) *Western Bank of Scotland v. Addie*, 1 Sc. App. Ca. 157; *Oakes v. Turquand*, 2 E. & I. App. Ca. 325; *Henderson v. Lacon*, 5 Eq. 261; *Swift v. Jewsbury*, L. R. 9 Q. B. 301; *Blake v. Albion Life Insurance Society*, 4 C. P. D. 99; *Weir v. Bell*,

3 Exch. D. 240; *Clydesdale Bank v. Paul*, 4 Dec. of Court of Session, 4th series, 628.

(*m*) *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. Ca. 163.

(*n*) *Bernard's Case*, 5 De G. & S. 283; *Ayre's Case*, 25 Beav. 513; *Burnes v. Pennell*, 2 H. L. 497; *Nicoll's Case*, 3 D. & J. 387, 437; *Wollaston's Case*, 4 D. & J. 437; *Att.-Gen. v. Briggs*, 1 Jur. N. S. 1084; *New Brunswick, &c., Railway Co. v. Conybeare*, 9 H. L. 711. See *Barry v. Crosskey*, 2 J. & H. 27.

(*o*) *Burnes v. Pennell*, 2 H. L. 497.

directors, or of its manager, or secretary, or of a clerk, if he is not singly an agent of the company (*p*). The rule that companies are bound by the misrepresentations of the directors applies only to the case of directors acting as a body (*q*).

Referees for information respecting a life to be assured are not thereby constituted the agents of the insured. If their information is false and fraudulent, but not to the knowledge of the assured, the insurer is not entitled to avoid the policy on the ground that it was induced by the fraud of the agent of the insured (*r*).

An agent whose authority is unknown cannot bind his principal by misrepresenting the authority conferred (*s*).

Although a principal is not bound by the statements of an agent when not acting within the scope of his authority, the case is different if a principal knows that a man is dealing with his agent under the belief that all statements made by the agent are warranted by the principal, and so knowing allows him to expend monies in that behalf. A court of equity will not afterwards allow the principal to set up the want of authority of the agent. The knowledge must, however, be brought home to the principal (*t*).

In *Brockwell's Case* (*u*), *Kindersley, V.-C.*, held that if the directors of a company in the exercise of their ordinary functions make a false report to the company, who adopt it, and the report finds its way into the hands of a man who takes shares on the faith of it, he could not be held liable (*x*). The authority of the case has been on two occasions (*y*) questioned by Lord Chelmsford (*z*). He has expressed himself as of opinion that a

Brockwell's Case.
False reports by directors of a company.

(*p*) *Holt's Case*, 22 Beav. 48 ;
Ayre's Case, 25 Beav. 513 ; *Gibson's Case*, 3 D. & J. 275 ; *Nicoll's Case*, 3 D. & J. 387 ; *Ex parte Frowd*, 30 L. J. Ch. 322 ; *Wollaston's Case*, 4 D. & J. 437.

(*q*) *Nicoll's Case*, 3 D. & J. 387, 440. See *National Exchange Co. v. Drew*, 24 Dec. of Court of Session, 2nd series, p. 1.

(*r*) *Wheelton v. Hardisty*, 8 E. & B. 232.

(*s*) Story on Agency.

(*t*) *Ramsden v. Dyson*, 1 E. & I. App. Ca. 129, per Lord Cranworth.

(*u*) 4 Drew. 205.

(*x*) See *National Exchange Co. v. Drew*, 2 Macq. 103.

(*y*) *Nicoll's Case*, 3 D. & J. 427 ; *New Brunswick, &c., Railway Co. v. Conybeare*, 9 H. L. 749.

(*z*) See, also, *Mixer's Case*, 4 D. & J. 583.

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company is not bound by false statements contained in reports of the directors to the company, which have been adopted at a general meeting but do not affect to give any more knowledge than what was contained in the directors' report; and which, although they have been published and have got into the hands of the public, have not been industriously circulated by the company. The distinction, however, suggested and taken by his Lordship does not seem sound law. In two late cases (*a*), *Kindersley, V.-C.*, said that he adhered to the opinion he had expressed in *Brockwell's Case*: and the weight of authorities is in favour of the opinion of his Honour (*b*). The general interests of society demand that as between an innocent company on the one hand and an innocent individual defrauded by the company on the other, misrepresentations by the directors of a company shall bind the company, although the shareholders may be ignorant of the representations and of their falsehood (*c*). It may be said that the reports of directors are not made *by* the company, but *to* the company; but the argument though plausible is not sound. The reports of directors, though addressed to the shareholders, are made under such circumstances that what they so report is known and intended to be known not only to the shareholders but to all persons who may be minded to be shareholders just the same as if they were published to the world: and the exigencies of mankind require that reports so made and circulated should be deemed to be the reports of the company (*d*). The case becomes all the stronger if the reports of directors have been adopted at a general meeting of the shareholders. After adoption a report is the act of the company, and not simply of the directors (*e*). If after adoption a report is industriously circulated, misstatements contained in it must be taken to be made with the authority of the company (*f*).

(*a*) *Worth's Case*, 4 Drew. 532; L. J.

Barrett's Case, 2 Dr. & Sm. 415, 5 N. R. 460.

(*b*) See *National Exchange Co. v. Drew*, 125, per Lord Cranworth, ib. 143, per Lord St. Leonards; *Nicoll's Case*, 3 D. & J. 387, per Turner,

(*c*) *National Exchange Co. v. Drew*, 2 Macq. 125.

(*d*) *National Exchange Co. v. Drew*, 2 Macq. 125, per Lord Cranworth.

(*e*) *Ib.* 143, per Lord St. Leonards.

(*f*) *New Brunswick, &c., Railway*

When an agent employs a sub-agent, and the latter in the course of his employment is guilty of fraud or misrepresentation, and the agent with knowledge of the fraud derives a material benefit from it, the case becomes analogous to that of a principal who profits by the fraud of his agent, the principle being that he who profits by the fraud of one who is acting by his authority, though committed without his authority, adopts the acts of the agent, and becomes responsible to the party who has been imposed upon and has sustained damage by reason of it. But an intervening agent such as a director of a company who is not a principal, cannot be regarded as a principal when he is acting for the interests of his company: nor is he liable for the fraudulent acts of those he employs because he may directly or indirectly receive an ultimate pecuniary benefit which is not the immediate and direct result of the fraud (*g*). Directors of a company, therefore, are not liable for misrepresentations made without their authority by persons employed by them on behalf of the company, and who in such employment were acting not as their agents but as the agents of the company (*h*).

It is not in general fraudulent for an agent to contract as if he were principal without disclosing the fact of his being an agent contracting for another (*i*), but it may be so under the circumstances of the case. Thus, where an apparent vendor of property had represented to the purchaser by means of a fictitious contract made collusively with the real owner that the property had been sold to him at a certain price, when in fact he was acting only as agent under an agreement by which he was to receive a large discount or commission for obtaining a sale at that price, the transaction was held to be fraudulent and the purchaser entitled to rescind the transaction (*k*). On the other hand for a man to represent that he is acting as agent when in fact he is acting on his own behalf is of no consequence, if it is immaterial to the purchaser with whom the contract is

Co., 9 H. L. 711. See *Barrett's Case*, 2 Dr. & Sm. 115.

(*g*) *Weir v. Bell*, 3 Exch. D. 249.

(*h*) *Ib.*

(*i*) *Nelthorpe v. Holgate*, 1 Coll. 220.

(*k*) *Lindsey Petroleum Co. v. Hurd*, L. R. 5 P. C. 221.

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made (*l*), but if it is material, as where the purchaser has been induced to contract because he has a set-off against the person with whom he intends to contract (*m*), or where the parties stand in a fiduciary relation to each other (*n*), the transaction is fraudulent.

Duty of disclosure in the case of policies of assurance.

The principle which treats non-disclosure as equivalent to fraud, when the circumstances impose a duty that disclosure should be made, obtains specially in respect to policies of assurance. The contract of assurance being essentially a contract of good faith, inasmuch as the risk which the insurer undertakes can only be learnt from the representations of the party proposing the insurance, courts of justice proceed upon a doctrine strictly analogous to that of the Roman law, and regard non-disclosure as fatal to the validity of the transaction (*o*).

Policies of marine assurance.

The rule with respect to the duty of disclosure applies with peculiar force in the case of policies of marine insurance. The validity of a contract of marine insurance being conditional upon the completeness, the truth, and the accuracy of the representations of the party proposing the insurance as to the risk, he is bound to make known to the underwriter everything within his knowledge which is of a nature to increase the risk which he is asked to undertake. There are many matters as to which he may be innocently silent. He is not bound to mention facts and circumstances which are within the ordinary professional knowledge of an underwriter: nor is he bound to communicate things which are well known to both parties, or which he is warranted in assuming to be within the knowledge of the party who is asked to undertake the risk; as, for instance, where a fact is one of public notoriety, as of war, or where it is a matter of inference and the materials for forming a judgment are common to both parties. But he is bound to communicate every fact which he is not entitled to assume to be in the knowledge of the underwriter. He

(*l*) *Fellows v. Lord Gwydyr*, 1 R. & M. 83.

(*m*) *Boulton v. Jones*, 2 H. & N. 564.

(*n*) *Kimber v. Barber*, 8 Ch. 56,

infra.

(*o*) *Carter v. Boehm*, 3 Burr. 1905; *Lindenau v. Desborough*, 8 B. & C. 586.

may not, however, speculate as to what may or may not be in the mind of the underwriter, or as to what may or may not be brought to his mind by the particulars disclosed to him. It is not enough that the underwriter be furnished with materials from which he may by a course of reasoning and effort of memory see the extent of the risk. The matter must not be left to speculation or peradventure. If the particulars furnished to the underwriter fall short of what the party proposing the insurance is bound to communicate, the contract is vitiated. It is immaterial whether the omission to communicate a material fact has arisen from intention, or indifference, or mistake, or from it not being present to the mind of the party proposing the insurance that the fact was one which ought to have been disclosed (*p*). The party proposing the insurance is bound to communicate not only every material fact of which he has actual knowledge, but every material fact of which he ought in the ordinary course of business to have knowledge, and must take all necessary measures by the employment of competent and honest agents to obtain through the ordinary channels of intelligence in use in the mercantile world all due information as to the subject-matter of the insurance. If by the fraud or negligence of the agent of the party proposing the insurance the underwriter is kept in ignorance of a fact material to the risk, the contract is vitiated (*q*). The concealment by the assured at the time of effecting a policy of assurance of a fact which is material to enable a rational underwriter, governing himself by the principles on which underwriters in practice act, to judge whether he shall accept the risk at all or at what rate, will vitiate the policy, although the fact may not be material with regard to the risk assured (*r*). An underwriter may, how-

(*p*) *Carter v. Boehm*, 5 Burr. 1905; *Bates v. Hewitt*, L. R. 2 Q. B. 595, 605, 606, 610; *Gauldy v. Adelaide Insurance Co.*, ib. 6 Q. B. 746; *Ionides v. Pender*, ib. 9 Q. B. 537; *Anderson v. Pacific, &c., Insurance Co.*, ib. 7 C. P. 68; *Stribley v. Imperial Marine Insurance Co.*, 1 Q.

B. D. 507; *Davies v. London & Provincial Marine Insurance Co.*, 8 Ch. D. 474; *Mercantile Steamship Co. v. Tyser*, 7 Q. B. D. 77.

(*q*) *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511.

(*r*) *Rivaz v. Gerussi*, 6 Q. B. D. 222.

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ever, in any particular case limit the right of full disclosure which he has by law to that of being informed of what is in the knowledge of the party proposing the insurance, not only as to its existence in point of fact, but also to its materiality (s). After the contract is complete, the party assured need not communicate to the underwriter facts which afterwards come to his knowledge material to the risk assured against (t).

Inasmuch, therefore, as according to the practice of insurance, the slip or memorandum of terms made for the purpose of drawing up the policy is considered as the final acceptance of the risk, any information not obtained until after the slip is initialed is immaterial; and if a policy is executed in accordance with the slip, it cannot be avoided on the ground of concealment of information (u).

Life assurance
policies.

It was formerly considered that policies of assurance on lives, like policies of insurance on ships, were made conditionally upon the truth or completeness of the representations respecting the risk, and that misrepresentation or concealment of a material fact, although not fraudulent, vitiated the policy (x). But it is now determined that such is not the case. The assured is always bound not only to make a true answer to the questions put to him, but to disclose spontaneously any fact exclusively within his knowledge, which it is material for the insurer to know. But it is not an implied condition of the validity of the policy that the insured should make a complete and true representation respecting the life proposed for insurance. Such condition, if intended, must be made a matter for express stipulation. If there be no warranty or condition on the part of the party proposing the insurance, the insurer is subject to all risks, unless he can show a fraudulent concealment or misrepresentation, or a non-communication of material facts known to the assured, which it was his duty

(s) *Jones v. Provincial Insurance Co.*, 3 C. B. N. S. 86.

(t) *Cory v. Patton*, L. R. 7 Q. B. 304; *Lishman v. Northern Maritime Assurance Co.*, ib. 10 C. P. 179.

(u) 1b. *Cory v. Patton*, L. R. 9 Q.

B. 577; *Fisher v. Liverpool Marine Insurance Co.*, ib. 418.

(x) *Lindenau v. Desborough*, 8 B. & C. 586; *Jones v. Provincial Insurance Co.*, 3 C. B. N. S. 86.

to communicate (*y*). It is, however, an implied condition that the person whose life is assured is alive at the time of making the policy. The policy is void if the person whose life is assured was dead at the date of the policy, though neither party to the policy was aware of his death (*z*). If there is a proviso that the policy shall not be disputed on the ground of merely untrue statements, not fraudulently made, a misrepresentation or concealment undesignedly made does not avoid the policy (*a*). An insurer may limit his right to that of being informed of what is in the knowledge of the party proposing the insurance, not only as to its existence in point of fact, but also as to its materiality (*b*). The declaration made as to the basis of the contract is taken as continuing up to the time of executing the policy, so that any intermediate change of circumstances rendering it untrue must be communicated; as where the declaration stated as required the name of the latest medical attendant of the insured, and before completing the policy he took the advice of another medical attendant who gave important information respecting his state of health, it was held that the declaration had become untrue and avoided the policy (*c*).

Policies of insurance against fire are made upon the implied condition that the description of the property inserted in the policy is true at the time of making the policy (*d*); and there is an implied condition that the property shall not be altered during the term for which it is insured, so as to increase the risk (*e*). In effecting an insurance against fire, it is the duty

Fire assurance policies.

(*y*) *Wheulton v. Hardisty*, 8 E. & B. 232; *Ex parte Daintree*, 18 W. R. 396; *British Equitable Insurance Co. v. Great Western Railway Co.*, 38 L. J. Ch. 314; *London Assurance v. Mansel*, 11 Ch. D. 367. See *Atty.-Genl. v. Ray*, 9 Ch. 407.

(*z*) *Pritchard v. Merchants' Life Assurance Society*, 3 C. B. N. S. 622.

(*a*) *Fowkes v. Manchester & London Life Assurance Co.*, 3 B. & S. 917. See *Wood v. Dwarries*, 11 Exch. 493;

Reis v. Scottish Equitable Life Assurance Co., 2 H. & N. 19; *Wheulton v. Hardisty*, 8 E. & B. 232.

(*b*) *Jones v. Provincial Insurance Co.*, 3 C. B. N. S. 86.

(*c*) *British Equitable Insurance Co. v. Great Western Railway Co.*, 38 L. J. Ch. 314.

(*d*) *Sillem v. Thornton*, 3 E. & B. 868.

(*e*) *Ib.*; *Stokes v. Cox*, 1 H. & N. 533.

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of the party proposing the insurance to communicate to the insurer all material facts within his knowledge touching the property (*f*). But the insurer may limit his right to that of being informed of what is in the knowledge of the party proposing the assurance, not only as to its existence in point of fact, but also as to its materiality (*g*).

Duty of disclosure in the case of contracts of guarantee or suretyship.

The strict rule with respect to non-disclosure, which obtains in the case of policies of insurance, does not extend to contracts of suretyship or guarantee. The contract is not one in which there is a universal obligation on the part of the creditor to make a full disclosure. But very little said which ought not and very little not said which ought to have been said will be sufficient to prevent the contract being valid (*h*). If the creditor be specially communicated with on the subject, he is bound to make a full, fair, and honest communication of every circumstance within his knowledge, calculated in any way to influence the discretion of the surety on entering into the required obligation (*i*). But he is not under any duty to disclose to the intended surety voluntarily and without being asked to do so, any circumstances unconnected with the particular transaction in which he is about to engage, which will render his position more hazardous, or to inform him of any matter affecting the general credit of the debtor, or to call his attention to the transaction, unless there be something in it which might not naturally be expected to take place between the parties (*k*). If the intended surety desires to know any particular matter of which the creditor may be informed, he must make it the subject of a distinct inquiry (*l*). But if there

(*f*) *Lindenau v. Desborough*, 8 B. & C. 592; *Bufe v. Turner*, 6 Taunt. 338.

(*g*) *Jones v. Provincial Insurance Co.*, 3 C. B. N. S. 86.

(*h*) *North British Insurance Co. v. Lloyd*, 10 Exch. 523; *Wythes v. Labouchere*, 3 D. & J. 609; *Lee v. Jones*, 17 C. B. N. S. 482. See *Greenfield v. Edwards*, 2 D. J. & S. 582.

(*i*) *Owen v. Homan*, 3 Mac. & G. 378; *Blest v. Brown*, 4 D. F. & J. 367; *Greenfield v. Edwards*, 2 D. J. & S. 582, 598. See *Smith v. Bank of Scotland*, 1 Dow, 272.

(*k*) *Hamilton v. Watson*, 12 Cl. & Fin. 119; *Small v. Currie*, 2 Drew. 102; *Wythes v. Labouchere*, 3 D. & J. 593, 609. See *Greenfield v. Edwards*, 2 D. J. & S. 582.

(*l*) *Hamilton v. Watson*, 12 Cl. &

be anything in the transaction that might not naturally be expected to take place between the parties concerned in it, the knowledge of which it is reasonable to infer would have prevented the surety from entering into the transaction, the creditor is under an obligation to make the disclosure (*m*). If, for instance, there be any private arrangement, or secret understanding, between the creditor and the debtor connected with the particular transaction, in which he is about to engage, whereby the risk of the surety is increased (*n*), or his position is so materially varied, that he is not in the position in which he might reasonably have contemplated to be (*o*); or if a party having reason to suspect the fidelity of his clerk requires security in such a way as to hold him out as one whom he considers a trustworthy person (*p*), or if, when the guarantee is a continuing one, an employer chooses to continue a clerk in his employment after discovering that he has been guilty of dishonesty in his service (*q*), or if the creditor has notice that the circumstances under which the debtor has obtained the concurrence of the surety lead to the suspicion of fraud (*r*); concealment is fraudulent and will vitiate the transaction (*s*). "It must in every case," said Lord Blackburn, in *Lee v. Jones* (*t*), "depend on the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist, and that fact must be generally a question of fact for the jury."

Fin. 109; *Wythes v. Labouchere*, 3 D. & J. 609. See *Greenfield v. Edwards*, 2 D. J. & S. 582.

(*m*) *Hamilton v. Watson*, 12 Cl. & Fin. 109, 119; *Lee v. Jones*, 17 C. B. N. S. 503; *Burke v. Rogerson*, 12 Jur. N. S. 635. See *Squire v. Whitton*, 1 H. L. 333; *Greenfield v. Edwards*, 2 D. J. & S. 582; *Rhodes v. Bate*, 1 Ch. 252; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259.

(*n*) *Pulcock v. Bishop*, 3 B. & C. 605.

(*o*) *Ecan v. Bremridge*, 2 K. & J.

174, 8 D. M. & G. 100; *Spaight v. Cowne*, 1 H. & M. 359.

(*p*) *Smith v. Bank of Scotland*, 1 Dow, 272.

(*q*) *Philipps v. Foxhall*, L. R. 7 Q. B. 679; *Sanderson v. Aston*, ib., 8 Exch. 75. Comp. *Fearnley v. London Guarantee Insurance Co.*, 6 L. R. 1. 220, 394.

(*r*) *Owen v. Homan*, 4 H. L. 997; *Lee v. Jones*, 17 C. B. N. S. 503; *Rhodes v. Bate*, 1 Ch. 252.

(*s*) See *Squire v. Whitton*, 1 H. L. 333.

(*t*) 17 C. B. N. S. 506.

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But though the strict rule with respect to non-disclosure which obtains in the case of policies of insurance does not extend to contracts of suretyship, the contract of suretyship is based upon the free and voluntary agency of the individual who enters into it. Anything like pressure used by the intending creditor will have a very serious effect on the validity of the contract, and the case is stronger when pressure is the result of maintaining a false conclusion in the mind of the person pressed (*u*).

Concealment in
the case of com-
promises.

In order that a compromise may be supported in equity, it is essential that the parties should have acted with equal knowledge, or at least equal means of knowledge, in the matter. If one of the parties has knowledge of a material fact, which he withholds from the others, and which they have not reasonable means of knowing, the transaction cannot stand. A compromise cannot be approved of where one party knows only so much of his rights as the opposite party chooses to apprise him of. To constitute a fair compromise of a doubtful right, the facts creating the doubt should be equally known by all the parties. There must be a full and fair communication of all material circumstances affecting the question which forms the subject-matter of the agreement, which are within the knowledge of the several parties, and which the others have not reasonable means of knowing, whether such information be asked for by them or not. There must not only be good faith and honest intention, but full disclosure, and without full disclosure honest intention is not sufficient. A party to a compromise who has knowledge of a fact, must not take upon himself to decide that the suppressed fact is immaterial, if it could by any possibility have had any influence on the decision of the other party (*x*). If the compromise is a transaction in the nature of

(*u*) *Davies v. London & Provincial Marine Insurance Co.*, 8 Ch. D. 474.

(*x*) *Gibbons v. Caunt*, 4 Ves. 840; *Walker v. Symonds*, 3 Sw. 1; *Gordon v. Gordon*, ib. 471; *Leonard v. Leonard*, 2 B. & B. 180; *Hotchkiss v. Dickson*, 2 Bligh, 348; *Stewart v. Stewart*, 6 Cl. & Fin. 911; *Harvey v.*

Cooke, 4 Russ. 34; *Pickering v. Pickering*, 2 Beav. 56; *Greenwood v. Greenwood*, 2 D. J. & S. 28; *Brooke v. Lord Mostyn*, ib. 373; *Moxon v. Payne*, 8 Ch. 881; *De Córdova v. De Córdova*, 4 App. Ca. 702. See *Lloyd v. Passingham*, Coop. 152; *McKellar v. Wallace*, 8 Moo. P. C. 378; *Trigge*

a family arrangement, or if, under the circumstances of the case, it was the duty of the one party to see that the nature of the transaction was fully explained to the other, these principles apply with peculiar force (*y*). A family settlement will not be supported, if founded on a mistake of either party to which the other is accessory, although such mistake may have been innocently made (*z*). But if the parties to a family arrangement are not on good terms, and are really at arms' length, the ordinary rules as to disclosure in family arrangements have no place (*a*).

The rule with respect to compromises, which applies between private individuals, is not less applicable to compromises by the Court on behalf of infants. The orders of the Court cannot be set aside on grounds less strong than those which would be required to set aside transactions between competent parties (*b*).

The most comprehensive class of cases in which equitable relief is sought on the ground of concealment, is in the case of transactions between persons standing in a fiduciary relation to each other. In all such cases the party who fills the position of active confidence, is under an equitable obligation to disclose to the party towards whom he stands in such relation, every material fact which he himself knows calculated to influence his conduct on entering into the transaction. The suppression of any material fact renders the transaction impeachable in equity (*c*). This subject will come into review in a subsequent page, where the peculiar equities between persons standing in these predicaments come into consideration.

Concealment by persons standing in a position of fiduciary relation.

v. Lavallée, 15 Moo. P. C. 270; *Cook v. Greves*, 30 Beav. 378.

(*y*) *Dunnage v. White*, 1 Sw. 137; *Gordon v. Gordon*, 3 Sw. 400; *Leonard v. Leonard*, 2 B. & B. 180; *Harvey v. Cooke*, 4 Russ. 58; *Pickering v. Pickering*, 2 Beav. 56, 3 Jur. 743; *Smith v. Pincombe*, 3 Mac. & G. 653; *Davis v. Chanter*, 3 W. R. 321; *Greenwood v. Greenwood*, 2 D. J. & S. 28. See *Brent v. Brent*, 10 L. J. Ch. 84.

(*z*) *Fane v. Fane*, 20 Eq. 698.

(*a*) *Irvine v. Kirkpatrick*, 7 Bell, Sc. App. Ca. 186, 209.

(*b*) *Brooke v. Lord Mostyn*, 2 D. J. & S. 416.

(*c*) *Walker v. Symonds*, 3 Sw. 1; *Wood v. Downes*, 18 Ves. 120; *Bulkley v. Wilford*, 2 Cl. & Fin. 102, 177—181; *Maddeford v. Austwick*, 1 Sim. 89; *Lloyd v. Attwood*, 3 D. & J. 614; *Tomson v. Judge*, 3 Drew. 306.

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Equitable appli-
cation of the
doctrine of mis-
representation.

The principle of law that a man who makes a representation to another in such a way or under such circumstances as to induce him to believe that it is meant to be acted on, is liable as for a fraud in the event of the representation proving to be false and damage thereby accruing to the party to whom it was made, is the ground on which the doctrine of equitable estoppel rests. "The law is clear," said Lord Denman, in delivering the judgment of the Court in *Pickard v. Sears* (d), "that where one by his words or conduct wilfully causes another to believe in a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In *Freeman v. Cooke* (e) Lord Wensleydale, in delivering the judgment of the Court, stated that the rule laid down in *Pickard v. Sears*, "was to be considered as established, but that by the term 'wilfully' in that rule must be understood, if not that the party represents that to be the truth which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it accordingly, and he accordingly does act upon it as true, the party making the representation would be equally precluded from contesting its truth" (f). "This doctrine," said Lord Cranworth in *West v. Jones* (g), "is not confined to cases where the original representation was fraudulent. The doctrine goes much farther. Even when a representation is made in the most entire good faith, if it be made in order to induce another to act upon it or under circumstances in which the party may reasonably suppose it will be acted on, then *primâ facie* the party making the representation is bound by it as between himself and those whom he has thus misled. . . . A party acting or abstaining to act on the faith

(d) 6 A. & E. 476.

(e) 2 Exch. 654.

(f) See *Svan v. North Australian Co.*, 2 H. & C. 182; *Carr v.**London & North Western Railway Co.*, L. R. 10 C. P. 307.

(g) 1 Sim. N. S. 207.

of such a representation has a right as between himself and the person by whom he has been so misled to treat the representation as true." "The doctrine of equitable estoppel by representation," said Lord Selborne in *Bank of Louisiana v. National Bank of New Orleans* (*h*), "is this, that if a man dealing with another for value makes statements to him as to existing facts which being stated would affect the contract, and without reliance upon which or without the statement of which the party would not enter into the contract, and which being otherwise than as they were stated would leave the situation after the contract different from what it would have been if the representations had not been made, then the person making the representations shall, so far as the powers of the Court extend, be treated as if the representations were true, and shall be compelled to make them good." "Where," said Lord Blackburn in *Knights v. Whiffen* (*i*), "one states a thing to another with a view to the other altering his position, or knowing that as a reasonable man he will alter his position, then the person to whom the statement is made is entitled to hold the other bound, and the matter is regulated by the state of facts imported by the statement." A man, accordingly, who has by express representation or positive acts induced a reasonable man to believe the existence of a particular fact or state of facts or things and to believe that the representation, as conveyed to his mind, was meant to be acted on, will not be permitted by the Court to derogate from interests which have been created or rights which have been acquired on the faith of the existence of such a fact or state of facts or things, by showing that the fact or state of facts or things was not such as he had represented it to be, or by determining the actual state of things which he has so held forth as the consideration for the change of his condition by the other, or to enforce his legal right, if any, against him, unless the latter has received the benefit which he contemplated at the time he was induced to alter his condition (*k*).

In *Freeman v. Cooke* it appeared that the representation

(*h*) 6 E. & I. App. Ca. 360.

(*i*) L. R. 5 Q. B. 664.

(*k*) *Pigott v. Stratton*, John. 359,

1 D. F. & J. 49.

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relied on as an estoppel was indeed made so as to induce the defendant to do the act complained of, but not with the intention of inducing him to do that act, and further that it was contradicted before being acted upon, so that, considering the statements together, no reasonable man would have acted upon the original representation as true, and the representation was consequently on either of the above grounds holden not to be conclusive.

The only case where a representation as to the future can operate as an estoppel is where it relates to the purposed abandonment of an existing right, and was intended to influence, and has in fact influenced, the conduct of the party to whom it was made. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made (*l*).

The principle is not limited to cases where an express and distinct representation by words has been made, but applies equally to cases where a man by his silence causes another to believe in the existence of a certain state of things, or so conducts himself as to induce a reasonable man to take the representation to be true, and to believe that it was meant that he should act upon it, and he accordingly acts upon it and so alters his previous position. Where there is a duty or obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak and does not say the thing he was bound to say, if that be done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, there is fraud (*m*). "A party," said Lord Wensleydale in *Freeman v. Cooke* (*n*), "who, in neglect of a duty cast upon him to speak, stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving" (*o*). "The doctrine," said Lord Campbell

(*l*) *Insurance Co. v. Mowry*, 6 Otto (Amer.), 544.

(*m*) *Brownlie v. Campbell*, 5 App. Ca. 950, *per* Lord Blackburn.

(*n*) 2 Exch. 663.

(*o*) See *Carr v. London & North Western Railway Co.*, L. R. 10 C. P. 307.

in *Cairncross v. Lorimer* (*p*), "is to be found in the laws of all civilised nations that if a man either by words or conduct has intimated that he consents to an act which has been done, or that he will offer no opposition to it, although it could not have been done lawfully without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. . . . If a party has an interest to prevent an act being done, and has full notice of its having been done, and he acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous licence." Nor can parties who stand by without asserting their rights and allow others to incur liabilities which they might not have incurred if those rights had been asserted, set up those rights as against those by whom such liabilities have been incurred (*q*).

When, for instance, a man builds or lays out monies upon land, supposing it to be his own, and believing that he has a good title, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error; or where a man, under an expectation created or encouraged by the owner of land that he shall have a certain interest, takes possession of such land, with the consent of the owner, and upon the faith of such promise or expectation, with the knowledge of the former, and without objection by him, lays out monies upon the land; in such cases a court of equity will not afterwards allow the real owner or the landlord, as the case may be, to assert his legal right against the other, without at least making him a proper compensation for the expenditure which he has incurred (*r*). If the works on which monies have been laid out

(*p*) 3 Macq. 829.

(*q*) *Olliver v. King*, 8 D. M. & G. 118, per Turner, L. J.; *Lindsay v. Gibbs*, 3 D. & J. 697.

(*r*) *East India Co. v. Vincent*, 2 Atk. 83; *Dann v. Spurrier*, 7 Ves. 235; *Shannon v. Bradstreet*, 1 Sch. & Lef. 52; *Gregory v. Mighell*, 18

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are of a permanent character, or are works which point to permanence, the Court will not allow them to be interfered with, even upon the payment of a proper compensation. A man who by his conduct has encouraged another to spend monies on his land, in erecting works of a permanent character, cannot be permitted to put an end to the very thing which he has approved. All that he is entitled to is a proper compensation in respect of the land which has been taken (s). The principle applies to companies as well as individuals (t). The case in which the principle has been carried to the farthest extent is *Clavering v. Thomas* (u). It was there held that a man who has stood by and allowed monies to be spent in opening a mine, which he knew could only be worked by a wayleave over his own land, was bound in equity to give the wayleave.

Another illustration of the principle that a man who remains silent when there is a duty to speak is bound in equity, is where a man claiming a title in himself to property is privy to the fact of another, with colour of title, or pretending to title, dealing with the property, as being his own, or as being unincumbered, and conceals his claim. A man who claims an interest in property need not voluntarily communicate the existence of his claim to a person whom he knows to be about purchasing the property (x), but the suppression or concealment of his claim is in equity a fraud, if a man is privy to the fact that the apparent owner or party in possession is about

Ves. 328; *Cardor v. Lewis*, 1 Y. & C. 427; *Garrard v. O'Reilly*, 3 Dr. & War. 414; *Clare v. Harding*, 6 Ha. 273; *Powell v. Thomas*, ib. 305; *Duke of Leeds v. Lord Amlurst*, 2 Ph. 117; *White v. Wakley*, 26 Beav. 20; *Laird v. Birkenhead Railway Co.*, John. 514; *Harcourt v. White*, 28 Beav. 303; *Archbold v. Scully*, 9 H. L. 360; *O'Fay v. Burke*, 8 Ir. Ch. 225; *Burke v. Prior*, 15 Ir. Ch. 106. See *Ramsden v. Dyson*, 1 E. & L. App. Ca. 129; *Nuon v. Fabian*, 1 Ch. 35.

(s) *Duke of Beaufort v. Patrick*, 17 Beav. 60; *Somersetshire Canal Co. v. Harcourt*, 2 D. & J. 596; *Mold v. Wheatecroft*, 27 Beav. 516; *Davies v. Sear*, 7 Eq. 433. See *Bell v. Midland Railway Co.*, 3 D. & J. 673.

(t) *Hill v. South Staffordshire Railway Co.*, 11 Jur. N. S. 192.

(u) Cit. 5 Ves. 689, 6 Ha. 304. But see *Willmott v. Barber*, 15 Ch. D. 104.

(x) See *Rooper v. Harrison*, 2 K. & J. 103; *Mungles v. Dixon*, 3 H. L. 739.

to deal with the property as his own, and as unencumbered, and he does not give the party with whom he is about to deal notice of his right. He will not be permitted by the Court to set up afterwards his own interest against a title created by the other (*y*). In a case where a mother heard her son before his marriage declare that a certain term was to come to him at her death, and was witness to a deed, whereby the reversion was settled on the issue of the marriage, she was held compellable in equity to make good the settlement (*z*). So, also, in a case where a man having a claim upon property, which was the subject of a reference, knew that the arbitration was going on but did not bring forward his claim, he was held bound by the award (*a*). So, also, where a purchaser agreed with the vendor to buy property and the vendor's solicitor concealed the fact that he had an encumbrance on the estate, it was held that he must take subject to the interest which he had allowed to be acquired in consequence by the person whom he misled in the transaction (*b*). If indeed a married woman having the opportunity does not repudiate her fraudulent act committed under her husband's coercion, she will be bound by it as against a purchaser who bought without notice. Thus where a woman shortly after her marriage under threats from her husband wrote and signed a paper, whereby she purported to give him her reversionary interest in a sum of stock which the husband subsequently sold to a purchaser who had no notice of the fraud, and the wife on being applied to on his behalf and not being under duress stated that she had before marriage made over her interest to her husband, it was held that as against the purchaser

(*y*) *Teasdale v. Teasdale*, Sel. Ca. Ch. 59; *Hunsden v. Cheyney*, 2 Vern. 150; *Raw v. Pote*, ib. 239; *Draper v. Borlase*, ib. 370; *Ibbotson v. Rhodes*, ib. 554; *Savage v. Foster*, 9 Mod. 36; *Berrisford v. Milward*, 2 Atk. 49; *Beckett v. Cordley*, 1 Bro. C. C. 357; *Gorett v. Richmond*, 7 Sim. 1; *Brown v. Thorpe*, 11 L. J. Ch. 73; *Boyd v. Bolton*, 1 J. & L. 730; *Thompson v. Simpson*, 2 J. & L. 110; *Nicholson v. Hooper*, 4 M. & C. 179;

Zulueta v. Tyrie, 15 Beav. 591; *Mangles v. Dixon*, 3 H. L. 739; *Olliver v. King*, 8 D. M. & G. 110; *Davies v. Davies*, 6 Jur. N. S. 1322; *Upton v. Fanner*, 1 Dr. & Sim. 594; *Hooper v. Gumm*, 2 Ch. 282.

(*z*) *Hunsden v. Cheyney*, 2 Vern. 150.

(*a*) *Gorett v. Richmond*, 7 Sim. 1.

(*b*) *Sterry v. Combs*, 40 L. J. Ch. 595.

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she had lost her equity to a settlement when the fund fell into possession (c). So, where a married woman fraudulently concealed a settlement in order to induce a mortgagee to advance his money and the mortgage was completed, but before the deed was acknowledged by the married woman, the mortgagee received notice of the settlement, it was held that her estate was bound and that she could not defeat the mortgage (d). In *Mocatta v. Murgatroyd* (e), the principle was applied in the case of a first mortgagee, from the mere circumstance of his being a witness to a second mortgage, but the case goes too far. In order to postpone a prior mortgage, it is necessary to prove against him fraud or actual notice of the subsequent mortgage (f).

The equitable rule that a man claiming an interest in property may not stand by and conceal his claim, when he sees another dealing with the property as his own, or as unincumbered, applies with peculiar force, if the person claiming title has in any way actively encouraged the parties to deal with each other (g), or has confirmed the party in the error into which he has fallen, or if he derives any benefit from the delusion so caused (h).

In order to justify the application of the principle, it is indispensable that the party standing by should be fully apprised of his rights, and should by his conduct encourage the other party to alter his condition, and that the latter should act on the faith of the encouragement so held out (i). The principle does not apply in favour of a stranger who builds on land, knowing it to be the property of another, nor in favour of a lessee who expends monies with the knowledge of his landlord on the improvement of the estate. If a stranger builds on land

(c) *Re Lush's Trust*, 4 Ch. 591.

(d) *Sharp v. Foy*, 4 Ch. 35.

(e) 1 P. W. 393.

(f) *Beckett v. Cordley*, 1 Bro. C. C. 353.

(g) *Dyer v. Dyer*, 2 Ch. Ca. 108 ; *Draper v. Borlase*, 2 Vern. 370 ; *Ibbotson v. Rhodes*, ib. 553 ; *Brown v. Thorpe*, 11 L. J. Ch. 73 ; *Davies*

v. Davies, 6 Jur. N. S. 1322.

(h) *Nicholson v. Hooper*, 4 M. & C. 179.

(i) *Dann v. Spurrier*, 7 Ves. 230 ; *Barnard v. Wallis*, Cr. & Ph. 85 ; *Marker v. Marker*, 9 Ha. 16 ; *Hooper v. Clark*, 25 L. J. Ch. 467 ; *Ramsden v. Dyson*, 1 E. & I. App. Ca. 129.

knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it. So, also, if a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope and expectation of an extended term or an allowance for it, then if such hope or expectation has not been created or encouraged by the landlord, the tenant has no equity to prevent the landlord from taking possession of the land and buildings when the tenancy is determined (*k*). Nor does the principle apply in favour of a man who is conscious of a defect in his title, and with such conviction in his mind expends money in improvements on the estate (*l*).

A man who, with full knowledge of the real circumstances of the case, permits another, under a mistake, to execute a deed, whereby he incurs a liability, cannot be heard to say that he has contracted liability on the faith of the other being subject to the liability (*m*).

But a man is not to be deprived of his legal rights on the ground of acquiescence unless he has acted in such a way as would make it fraudulent in him to set up those rights (*n*). "There are several elements or requisites," said Mr. Justice Fry (*o*), "necessary to constitute fraud of that description. In the first place the plaintiff," (the party who alleges acquiescence) "must have made a mistake as to his legal rights. Secondly, he must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right, which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the

(*k*) *Pilling v. Armitage*, 12 Ves. 78; *Clare Hall v. Harding*, 6 Ha. 273; *Duke of Beaufort v. Patrick*, 17 Beav. 60; *Hamer v. Tilsley*, John. 487; *O'Fay v. Burke*, 8 Ir. Ch. 226; *Ramsden v. Dyson*, 1 E. & I. App. Ca. 129, per Lord Kingsdown. See

Rennie v. Young, 2 D. & J. 142.

(*l*) *Kenney v. Brown*, 3 Ridg. 518.

(*m*) *Broughton v. Hutt*, 3 D. & J. 501.

(*n*) *Willmott v. Barber*, 15 Ch. D. 105.

(*o*) *Ib*.

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plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the possessor of the legal right must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls on him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in other acts which he has done either directly or by abstaining from asserting his legal right. When all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but nothing short of this will do."

The rule of law as to leave and licence not being countermandable cannot, perhaps, as far as it goes, be distinguished from the equitable doctrine of acquiescence (*p*), but leave and licence executed may be set up at law, as giving a right and title, only in cases where monies have been expended by a man upon his own land (*q*). No right or title can be acquired to an easement, or other right over the land of another, although the licence may have been executed, and monies may have been expended upon the land of the licensee by his express permission. The licence may be at any time countermanded at the will of the owner of the soil (*r*). But in equity the doctrine of acquiescence applies as well where a man has been induced to expend monies on the land of another, as where the expenditure has been on his own land (*s*).

The equitable doctrine with respect to the part performance of parol agreements is founded on the general doctrine of law as to misrepresentation. At law the express language of the

Part perform-
ance.

(*p*) *Davies v. Marshall*, 10 C. B. N. S. 711, *per* Willes, J.; but see *Swaine v. Great Northern Railway Co.*, 9 Jur. N. S. 1196.

(*q*) *Winter v. Brockwell*, 8 East, 309; *Hewlins v. Shipham*, 5 B. & C. 221; *Liggins v. Inge*, 7 Bing. 682; *Davies v. Marshall*, 10 C. B. N. S. 711; *Blood v. Keller*, 11 Ir. C. L. 124.

(*r*) *Wallis v. Harrison*, 4 M. &

W. 538; *Wood v. Leadbitter*, 13 M. & W. 838; *Davies v. Marshall*, 10 C. B. N. S. 711. See *Fisher v. Moon*, 11 L. T. N. S. 623; but see *Blood v. Keller*, 11 Ir. C. L. 124.

(*s*) *Duke of Devonshire v. Eglin*, 14 Beav. 530; *Duke of Beaufort v. Patrick*, 17 Beav. 60; *White v. Wakley*, 26 Beav. 20; *Laird v. Birkenhead Railway Co.*, John. 500; *Willmott v. Barber*, 15 Ch. D. 96.

Statute of Frauds prevails, and the doctrine as to the part performance of parol agreements has no place. But in equity it is a fraud in the eye of the Court to set up the absence of an agreement, where possession has been given on the faith of an agreement. If a man has been permitted to take possession on the faith of an agreement, it is against equity that he should be treated as a trespasser and turned out of possession, on the ground that there is no agreement. Where possession has been given on the faith of an agreement, a Court of equity will, as far as possible, ascertain the terms of the agreement, and give effect to it (*t*). Nothing, however, is part performance that does not put the party into a situation that it is a fraud upon him, if the agreement be not performed (*u*). In order, too, that an act of part performance may have any operation whatsoever, it must be shown plainly what the terms of the agreement are, and it must clearly appear that the act of part performance relied on is properly referable to an agreement such as the one alleged and is not referable to another title (*x*). The expenditure, for instance, by a tenant in possession on repairs, is referable to the title which he has in the estate, and cannot be deemed an act of part performance (*y*). But the laying out of money by a tenant in possession, in pursuance of a parol agreement for a lease, or upon the faith of a specific engagement that possession should not be disturbed, is an act of part performance (*z*). So, also, and upon

(*t*) *Mundy v. Jolliffe*, 5 M. & C. 177; *Wilson v. West Hartlepool Railway Co.*, 2 D. J. & S. 475. See *Bond v. Hopkins*, 1 Sch. & Lef. 413, 433; *Morphett v. Jones*, 1 Sw. 172; *Surcombe v. Pinniger*, 3 D. M. & G. 571; *Great Northern Railway Co. v. Lancashire, &c., Railway Co.*, 1 Sm. & G. 81; *Porell v. Lovegrove*, 8 D. M. & G. 357; *Pain v. Coombs*, 1 D. & J. 34; *Lillie v. Leigh*, 3 D. & J. 204; *Lincoln v. Wright*, 4 D. & J. 16.

(*u*) *Clinan v. Cooke*, 1 Sch. & Lef. 41.

(*x*) *Fry on Specific Performance*, 252. See *Dale v. Hamilton*, 5 Ha. 381; *Lincoln v. Wright*, 4 D. & J. 16; *Price v. Salusbury*, 32 Beav. 446.

(*y*) *Wills v. Stradling*, 3 Ves. 378; *Pilling v. Armitage*, 12 Ves. 78; *Savage v. Carroll*, 1 B. & B. 265; *Brennan v. Bolton*, 2 Dr. & War. 349. See *Romsden v. Dyson*, 1 E. & I. App. Ca. 129.

(*z*) *Wills v. Stradling*, 3 Ves. 378; *Mundy v. Jolliffe*, 5 M. & C. 167; *Sutherland v. Briggs*, 1 Ha. 26; *Shillibeer v. Jarvis*, 8 D. M. & G. 79;

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the same principle, the possession of a tenant after the expiration of a lease, is not a part performance, for it is referable to the title he has (a); but it is otherwise if the possession be referable to an agreement for renewal (b). There must be a necessary connection between the act of part performance and the interest in the land which is the alleged subject matter of the agreement. It is not sufficient that the acts are consistent with the existence of such an agreement or that they suggest or indicate the existence of some agreement, unless such agreement has reference to the subject matter. Thus payment of part or even of the whole of the purchase money is not sufficient to exclude the operation of the Statute of Frauds, unless it is shown that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement. On the other hand the admission into possession of a stranger is, speaking in general terms, a sufficient part performance, for it is not explicable upon any other supposition than that it has resulted from a contract in respect of the land of which possession has been given. Again the continuance in possession of a tenant is not in itself a sufficient part performance of a parol agreement for the purchase of the land, for it is equally consistent with a right depending on his tenancy (c). The mere payment of money is not part performance (d), nor is marriage an act of part performance, but if one of the contracting parties agrees, as the consideration for a marriage, to do something more than marry, as to settle an estate, and in consideration of that promise the other party contracts to make a settlement, the settlement made by the one contracting party is a good act of part performance (e).

Laird v. Birkenhead Railway Co., 41. John. 530; *Nunn v. Fabian*, 1 Ch. 35; *Williams v. Evans*, 19 Eq. 547.

(a) *Wills v. Stradling*, 3 Ves. 378; *Lincoln v. Wright*, 4 D. & J. 20.

(b) *Dowell v. Dew*, 1 Y. & C. C. 345.

(c) *Alderson v. Muldison*, 7 Q. B. D. 178, *per* Baggallay, L. J.; *Hamphreys v. Green*, 10 Q. B. D. 154.

(d) *Clinan v. Cooke*, 1 Sch. & Lef.

(e) *Hammersley v. De Biel*, 12 Cl. & Fin. 45. See *Warden v. Jones*, 2 D. & J. 76; *Caton v. Caton*, 1 Ch. 137, 2 E. & L. Ap. 127; *McCuskie v. McCoy*, 1 R. 2 Eq. 453. See further on the subject of part performance, Fry on Specific Performance, 252—270, Sug. V. & P. 150—157; Dart, V. & P. 1023—1032.

A parol agreement to grant a lease, entered into by a tenant for life with a leasing power, coupled with part performance by the lessee during the lifetime of the tenant for life, does not bind the remainderman who did not acquiesce in the part performance or know of the agreement (*f*).

In cases where the aid of the Court is sought on the ground of part performance, the facts must be looked at carefully to see what confirmation there is of the plaintiff's statement, and in looking through the evidence, the Court is particularly careful to see if there are any documents which confirm it (*g*). Where no written documents exist, the proof in support of the claim must be clear beyond all reasonable doubt (*h*).

The general doctrine of law with respect to misrepresentation and concealment applies to cases where a man by conduct of culpable negligence misleads another to his prejudice, or puts it in the power of one man to commit a fraud upon another. If a man by neglect of some duty that is owing to another, or to the general public, of whom he is one, leads him to believe in the existence of a certain state of facts, and the belief so induced is the proximate cause of leading him to do a certain act, the former shall not afterwards as against the latter be heard to show that that state of facts did not exist, but must abide by the consequences of his own wilful and unjustifiable neglect (*i*). It is immaterial that he may have been acting merely carelessly, and that his conduct may be free from any improper motive. Although a man may be acting in the most entire good faith, if he is guilty of such a degree of neglect as to enable another so to deal with that which is his right as to lead an innocent party to assume that he is dealing with his own, he creates an equity against himself in favour of the innocent party, who has been so misled, and must bear the loss (*k*). If

Negligence may be tantamount to misrepresentation.

(*f*) *Hope v. Cloncurry*, 1 R. 8 Eq. 555.

(*g*) *Nun v. Fabian*, 1 Ch. 35.

(*h*) *Hove v. Hull*, 1 R. 4 Eq. 252.

(*i*) *Swan v. North Australasian Co.*, 2 H. & C. 182, *per* Lord Blackburn; *Dixon v. Muckleston*, 8 Ch.

160, *per* Lord Selborne; *Carr v. London & North Western Railway Co.*, 1 R. 10 C. P. 307.

(*k*) *Teasdale v. Teasdale*, Sel. Ca. Ch. 59; *Evans v. Bicknell*, 6 Ves. 181; *Vandeleur v. Blagrove*, 17 L. J. Ch. 45; *Waldron v. Sloper*, 1 Drew.

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he puts into the hands of another the means of obtaining money from a third person, he never can be able to get a decree to get rid of that transaction arising out of the securities which he has intrusted to another, and of which he, the party complaining, was the author, without first repaying the monies thus obtained (*l*). If he arms another with the symbol of property, he should be the sufferer and not the person who gives credit to the operation and is misled by it (*m*). It is a well-known principle that where one of two innocent must suffer from the fraud of a third, the loss should be borne by him who has enabled the third party to commit the fraud (*n*). When accordingly a solicitor fraudulently induced a client to execute a conveyance of an estate to himself, and to sign an indorsed receipt for the purchase money as having been paid to him, though no money had in fact been paid, and the solicitor took possession of the estate and made an equitable mortgage of the estate, representing it to be his own and unincumbered: it was held that the client who had signed the receipt was guilty of such negligence that he ought to be postponed to the equitable mortgagee who had a good equitable title without notice, and who had advanced his money on the faith of the representation contained in the instrument (*o*). So, also, if a man leave a deed executed by him in the hands of another person, and that deed so left in his hands is made by him a security to a third person who acts honestly and fairly in the transaction, it is not competent for the person who has left the deed in his hands to set up against the third party, who has honestly taken it as a

193; *Perry Herrick v. Attwood*, 2 D. & J. 21.

(*l*) *Lord Aldborough v. Trye*, 7 Cl. & Fin. 463.

(*m*) *Tickers v. Hertz*, 2 Sc. App. Ca. 115.

(*n*) *Vandeleur v. Blagrove*, 17 L. J. Ch. 52; *Taylor v. Great Indian Peninsula Railway Co.*, 4 D. & J. 574; *Arnold v. Cheque Bank*, 1 C. P. D. 587; *London and South Western Bank v. Wentworth*, 5 Exch. D. 105; *Rose v. Sparens*, 7 Dec. of Court of

Session, 4th series, 925. To come within the principle, it is necessary that the representation should be false, and that the party to whom it was made should believe it to be true, and not have the means which would enable a prudent man to discover the falsehood. *Vandeleur v. Blagrove*, 17 L. J. Ch. 52, per Lord Cottenham.

(*o*) *Hunter v. Walters*, 7 Ch. 75. See *Withington v. Tate*, 4 Ch. 288.

security, the fact, if fact it be, of fraud having been committed upon the person leaving it (*p*). So, also, when a man having dealings with another duly and formally executed a deed in respect of the dealings with a receipt for the money endorsed, and delivered the deed to the agent of the other party without receiving the purchase money, and the agent received the purchase money from his principal and misappropriated it, it was held that the loss must fall on the former, inasmuch as he had by his negligence in delivering the deed to the agent put it into his power to commit the fraud (*q*). So, also, when a man having dealings with another in respect of which the same person acted as agent for both parties, delivered to the agent an instrument, reciting the payment of the purchase money, but without a receipt for the money being signed, and the agent received the money from the other party but did not pay it over to the former, or inform him that it was in his hands, it was held that the latter, who had paid the money into the hands of the agent, must bear the loss (*r*). So, also, where A. executed a mortgage to B. for 1,000*l.*, which was not acted on, but he afterwards executed another mortgage for 2,000*l.* to B., and the solicitor employed retained the first deed, and afterwards fraudulently induced B. without consideration to sign a memorandum undertaking to transfer the first mortgage to A., and he executed such transfer, and C., on the faith of B.'s act, advanced 1,000*l.*, which was received by the solicitor and misapplied, it was held that B. must be postponed to C. (*s*). So, also, where a transfer of certificates in a railway company had been forged, and the company registered the transfer and placed the transferee on the list of shareholders and delivered to him certificates, and he transferred the shares to another person, it was held that the giving of the certificates by

(*p*) *Greenfield v. Edwards*, 2 D. J. & S. 596. See *Bannfather's Claim*, 16 Ch. D. 179.

(*q*) *West v. Jones*, 1 Sim. N. S. 208.

(*r*) *Vandeleur v. Blagrave*, 6 Beav. 565, affirmed 17 L. J. Ch. 45. See *Young v. White*, 7 Beav. 506; *Young*

Guy, 8 Beav. 147; *Griffin v. Clowes*, 20 Beav. 61; *W'roux v. Davies*, 25 Beav. 369; *Smith v. Evans*, 28 Beav. 63; *Withington v. Tate*, 4 Ch. 288.

(*s*) *Horns v. Houlton*, 16 Beav. 259.

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the company to the transferee amounted to a statement by the company, intended to be acted on by purchasers in the market, that the transferee was entitled to the shares, and that the purchaser from him having acted upon the statement, the company was estopped from denying its truth (*t*).

So, also, where the plaintiffs to whom goods had been pledged and warehoused in their name, were induced by the fraudulent representations of the pledgor that he had sold the goods to the defendants, and would pay them out of the monies received in payment, handed him over a delivery order for the goods, which he gave to the defendants as security for advances, and the defendant, on the advances not being repaid, sold the goods; it was held that as the plaintiffs had allowed the pledgor to appear as the ostensible owner of the goods the loss must fall on them (*u*).

So, also, where the drawer of a cheque fills it up so carelessly as to enable the holder of the cheque to add figures, making it payable for a larger amount, he cannot, as against a banker, who has by his neglect in the mode of drawing up the cheque, been led to pay the forged cheque, complain of that payment or set up the invalidity of the document (*x*). So, also, a man who gives an acceptance in blank holds out the person to whom it is entrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp (*y*). So, also, when a bill is accepted in blank for the purpose of being negotiated, and is afterwards filled up with the name and signature of a person as drawer and indorser, the acceptor cannot as against a *bonâ fide* indorsee for value adduce evidence to show that either the drawing or indorsement is a forgery (*z*). So, also, where an employer signed an order for

(*t*) *Bahia v. San Francisco Railway Co.*, L. R. 3 Q. B. 584. See *Hart v. Frontino & Co. Gold Co.*, *ib.*, 5 Exch. 111; *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D. 213.

(*u*) *Babcock v. Larson*, 4 Q. B. D. 400, 5 Q. B. D. 285.

(*x*) *Young v. Grote*, 4 Bing. 253. See *Orr v. Union Bank of Scotland*,

1 Macq. 513.

(*y*) *Garrard v. Lewis*, 10 Q. B. D. 33.

(*z*) *London & South Western Bank v. Wentworth*, 5 Exch. D. 96. See *Roberts v. Tucker*, 16 Q. B. 580; comp. *Barendse v. Bennett*, 3 Q. B. D. 525.

payment of money which had been drawn up by his clerk in such a negligent way that the amount could be increased, and the clerk afterwards increased the amount, and a bank to which the order was presented cashed it, it was held that the employer was not entitled to complain of the cashing of the order in consequence of the negligent way in which the order had been drawn up (*a*).

The mere fact of a purchaser or mortgagee not being in possession of the title deeds will not, in the absence of other circumstances indicative of fraud, or gross and wilful negligence (*b*), affect his legal title as against subsequent purchasers

(*a*) *Halifax Union v. Wheelwright*, L. R. 10 Ex. Ch. 190. See *Arnold v. Cheque Bank*, 1 C. P. D. 587.

(*b*) The distinction between mere negligence and gross negligence was recognised by the Roman lawyers. *Culpa levis*, in the language of the Roman law, is the want of that diligence which is taken by prudent, careful persons; *culpa lata* is the want of that diligence which might be expected even of a person of less than ordinary prudence. Lindl. on Jur. 131. *Culpa lata* was considered generally equivalent to *dolus*. *Lata culpa dolo comparatur*. Dig. 11, tit. 6, leg. 1, § 1. "*Lata culpa est nimia negligentia id est non intelligere quod omnes intelligunt.*" Dig. Lib. 50, tit. 16, leg. 213. "*Si quis non ad eum modum quem nominum natura desiderat diligens est, fraude non caret.*" Dig. Lib. 16, tit. 3, leg. 32. "*Sensus est,*" adds a commentator, *ib.*, "*latam culpam duobus indicibus deprehendi. Primo, si quis non ad eum modum faciat, quo omnes homines faciunt: altero si quis non eodem modo in re aliena ac in suis rebus versetur; utrumque dolo proximum est. Levis est quoties eundem in alienis quam in suis rebus diligentiam et fidem præ-*

stat, non tamen eam quam circumspectores homines et diligentissimi adhibent: et, ut paucis dicam, levis culpa est consueti in rebus suis et alienis negligentia lata est in suis diligentia in alienis negligentia." If the fault is one which any man in his senses would have scrupled to commit, there is *lata culpa*: if the fault consists in falling short of the highest standard of carefulness to avoid injury that could be found; such, for instance, as the carefulness employed in the management of affairs by a person who would deserve to be called *bonus paterfamilias*, the *culpa* was *levis* or *levissima*. Or, again, it might consist in falling short of the care which the person guilty of the *culpa* was accustomed to bestow on his own affairs. *Lata culpa* was treated very much on the same footing as *dolus*, as there always seems something wilful in the extreme negligence, the *crassa negligentia* which characterised the *lata culpa*. —Sandars, Inst. p. 477. When it is said by the Roman lawyers that negligence, heedlessness, or rashness is equivalent in certain cases to *dolus*, the meaning is that, judging from the conduct of the party, it is impossible to determine whether he

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or incumbrancers (*c*). But if a man on taking the legal estate makes no inquiry for the title deeds which constitute the sole evidence of the title to the property, or allows them to remain in the hands of the vendor or mortgagor, his conduct affords evidence of an amount of negligence and carelessness sufficient to justify the Court in assuming that he had abstained from making the enquiry from a suspicion that his title would be affected if it was made, and in imputing to him the knowledge which by the use of ordinary diligence he might have discovered. So, also, gross negligence will be imputed to a man who, having lent the title deeds to the vendor or mortgagor for a temporary and reasonable purpose, allows them to remain out of his hands for an unreasonable time, and does not reclaim them with proper diligence. If in either of such cases a fraudulent use is made of the title deeds by the vendor or mortgagor, and a new title is created by means of them in favour of a subsequent purchaser for value without notice, the first purchaser or mortgagee will be postponed in equity to the subsequent incumbrancer (*d*). But if a man on taking the legal estate, either as purchaser or mortgagee, inquires for the title deeds and a reasonable explanation or excuse is given for their non-delivery, or if he parts with them for a reasonable and temporary purpose, and does not allow them to remain out of his hands without making reasonable enquiries for them, or using reasonable endeavours to get them back, gross negligence will not be imputed to him, although a fraud may be practised by means of them upon an innocent party (*e*). The Court, it was said in *Ratliff v. Barnard* (*f*), will not take away his

intended or whether he was negligent, heedless, or rash; and that such being the case, it shall be presumed that he intended, and his liability shall be adjudged accordingly, provided that the question arise in a civil action. Austin Lect. on Jur., vol. 2, p. 107.

(*c*) *Eraus v. Bicknell*, 6 Ves. 174, 191; *Martinez v. Cooper*, 2 Russ. 198; *Colyer v. Finch*, 5 H. L. 905.

(*d*) *Hewitt v. Loosemore*, 9 Ha.

449; *Perry Herrick v. Attwood*, 2 D. & J. 21; *Lloyd v. Attwood*, 3 D. & J. 614; *Hopgood v. Ernest*, 3 D. J. & S. 116; *Briggs v. Jones*, 10 Eq. 92; *Ratliff v. Barnard*, 6 Ch. 652; *Fox v. Hawkes*, 13 Ch. D. 822; *Bannfather's Claim*, 16 Ch. D. 179.

(*e*) *Martinez v. Cooper*, 2 Russ. 198; *Stevens v. Stevens*, 2 Coll. 20; *Espin v. Pemberton*, 3 D. & J. 547.

(*f*) 6 Ch. 654

legal security from a man unless he has been guilty of fraud, or of that wilful negligence which leads the Court to conclude that he was an accomplice in the fraud (*g*).

The rule that a purchaser or mortgagee who neglects to make proper enquiries for the title deeds, or who allows them to remain in the hands of the vendor or mortgagor, will be postponed to a subsequent incumbrancer without notice, who obtains possession of the deeds, operates not only for the benefit of the incumbrancer who has obtained possession of the deeds, but also for the benefit of a subsequent incumbrancer who has advanced his money innocently in the belief that there was not any incumbrance prior to that of the incumbrancer in possession of the deeds and who has made proper enquiries as to the possession of the deeds (*h*).

In cases where the contract lies between parties having merely equitable interests, unaccompanied by the legal estate, negligence or indiscretion in the one may give the other, although his equity is posterior in creation, a better claim to the assistance of the Court. An equitable mortgagee accordingly, who either omits or neglects to get possession of, or who having got possession of the title deeds gives them up to the mortgagor and thereby arms him with the means of dealing with the estate, as the absolute legal or equitable owner, free from any shadow of incumbrance or adverse equity, will be postponed to a subsequent equitable incumbrancer without notice, who has got possession of the deeds, and whose equity in other respects is of the same nature and quality (*i*). In examining into the relative merits or equities of two parties having adverse equitable interests, the Court directs its attention not only to the nature and conditions of their respective equitable interests but to the circumstances of their acquisition, and the whole conduct of each party with respect thereto: and in examining into these points it must apply the test not of any

(*g*) See further, *infra*, notice.

(*h*) *Clarke v. Palmer*, 21 Ch. D. 124.

(*i*) *Allen v. Knight*, 5 Ha. 272, affirmed 11 Jur. 527; *Waldron v.*

Sloper, 1 Drew. 193; *Rice v. Rice*, 2 Drew. 83; *Dowle v. Saunders*, 2 H. & M. 242; *Adsetts v. Hives*, 33 Beav. 52; *Layard v. Maud*, 4 Eq. 397; *Spencer v. Clarke*, 9 Ch. D. 137.

technical rule or any rule of partial application, but the same broad principles of right and justice which a Court of equity applies universally in deciding upon contested rights (*k*). "A pre-existing equitable title," said Lord Cairns, in *Shropshire Union Canal Co. v. Reg. (l)*, "may be defeated by conduct, by representations, by mis-statements of a character which would operate and cause to forfeit and take away the pre-existing equitable title." When, accordingly, a vendor who chose to leave part of the purchase money unpaid, executed and delivered to the purchaser a conveyance in which there was a receipt indorsed acknowledging that the purchase money had been paid, and the purchaser fraudulently deposited the deed with an equitable mortgagee, it was held that the equitable mortgagee had a better equity than the vendor, inasmuch as the latter had in effect invited and encouraged the mortgagee to rely on the title of the purchaser (*m*). So, also, where an equitable mortgagee returned the deeds to the person from whom he had received them, who promised to return them but did not do so, and after keeping them a considerable time, deposited the deeds by way of equitable mortgage with a *bond fide* purchaser without notice, it was held that the first equitable mortgagee had by his laches lost his equity as against the second equitable mortgagee (*n*).

"Persons," said Lord Hatherley, in *Shropshire Union, &c., Canal Co. v. Reg. (o)*, "being real owners of equitable interests may so conduct themselves as to hold out to third persons dealing with their trustee that they are not such equitable owners. Either they have parted with their interest as in *Waldron v. Sloper*, where deeds had been parted with for four years, deeds that constituted in fact Waldron's only title, or it might be as in the case of *Rice v. Rice*, that they may have represented that they had parted with their interest by signing a receipt for the purchase-money when their only interest was a lien on the pur-

(*k*) *Rice v. Rice*, 2 Drew. 95, per Kindersley, V. C.; *Case v. James*, 3 D. F. & J. 263.

(*l*) 7 E. & I. App. Ca. 506.

(*m*) *Rice v. Rice*, 2 Drew. 95.

(*n*) *Waldron v. Sloper*, 1 Drew. 193. See *Adsetts v. Hires*, 33 Beav. 52; *Dowle v. Saunders*, 2 H. & M. 251.

(*o*) 7 E. & I. App. Ca. 512.

chase-money. In one manner or other they may have so represented that they have parted with their equitable rights and interests as to make it impossible for them again to set up that right against a person who has acquired a contradictory right upon the faith of that assertion and that representation."

If both parties have been guilty of neglect in the transaction, the one whose neglect has been the least will have the better equity (*p*).

In the case of mere equitable interests priority cannot be obtained through the medium of a breach of trust or duty. Where it is sought to postpone an equitable title created by declaration of trust a strong case must be made out. A trustee cannot without express authority, or at all events without authority to be implied from circumstances furnishing the most substantial grounds for the implication, either pledge the deeds of the *cestui que trust* or affect his estate or interest under them. A *cestui que trust* will not be postponed on the ground that he did not enquire into the acts or conduct of his trustee (*q*). Nor will negligence be imputed to a man who has taken a security in the name of another, if he do not watch his trustee. The fact that some of the money may have been advanced by the trustee does not vary the rule (*r*).

Nor will negligence be imputed to a man for leaving his title-deeds in the hands of his solicitor (*s*), or his certificates for shares with his bankers for safe custody (*t*), or for delivering a transfer of shares and certificates to a broker for the purpose of registration (*u*), or to a member of a partnership firm for allowing his partner to get possession of the deeds relating to the partnership property (*x*); nor will negligence be imputed to trustees for leaving documents of title relating to the trust estate in the hands of one of their number (*y*); or to a *cestui*

(*q*) *Vandeleur v. Blagrave*, 17 L. J. Ch. 52; *Wrouth v. Davies*, 25 Beav. 369; *Withington v. Tate*, 4 Ch. 288.

(*r*) *Cory v. Eyre*, 1 D. J. & S. 168; *Shropshire Union, &c., Canal Co. v. Reg.*, 7 E. & L. App. Ca. 507.

(*s*) *Bradley v. Riches*, 9 Ch. D. 193.

(*s*) *Cory v. Eyre*, 1 D. J. & S. 149; *Bozon v. Williams*, 3 Y. & J. 150.

(*t*) *Johnston v. Renton*, 9 Eq. 181.

(*u*) *Donaldson v. Gillott*, 3 Eq. 277.

(*x*) *Carander v. Bullock*, 9 Ch. 79.

(*y*) *Cottam v. Eastern Counties Railway Co.*, 1 J. & H. 213.

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que trust for allowing the trustee to have in his possession documents of title relating to the trust estate (*z*); nor will negligence be imputed to a man for delivering over certificates for shares as a security for monies advanced in a regular and proper course of business (*a*); nor can there be negligence in relying on the honesty of servants in the discharge of their ordinary duty (*b*); nor will negligence be imputed to trustees for leaving a corporation seal in the hands of their secretary (*c*).

Negligence, however, to amount to an estoppel or to raise an equity must be negligence in the transaction itself, and must be the proximate cause of leading the party into the mistake. It is not enough that the negligence be collateral to the transaction. It must also be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom that person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy (*d*). In a case, accordingly, where a man who owned shares in two companies executed a transfer of shares in blank, and gave his broker authority to fill them up with shares in one company, and the broker filled them up with shares in the other company, which were afterwards transferred to an innocent person, the Court held that the negligence of the owner of the shares in executing the deed in blank was not the real and proximate cause of the loss, but that the proximate cause of the loss was the forgery and felony of the broker and his fraudulent conduct in converting deeds intended to operate on shares in one company into the means of disposing of shares in another (*e*).

So also in a case where the bill sued on bore the defendant's

(*z*) *Shropshire Union, &c., Canal Co. v. Reg.*, 7 E. & I. App. Ca. 496.

(*a*) *Ortigoza v. Brown*, 47 L. J. Ch. 168.

(*b*) *Arnold v. Cheque Bank*, 1 C. P. D. 587.

(*c*) *Bank of Ireland v. Evans Charities*, 5 H. L. 409.

(*d*) *Sutton v. North Australasian*

Co., 2 H. & C. 182, *per* Lord Blackburn; *Carr v. London & North Western Railway Co.*, L. R. 10 C. P. 307, *per* Brett, L. J.; *Arnold v. Cheque Bank*, 1 C. P. D. 587; *Cooper v. Vesey*, 20 Ch. D. 634.

(*e*) *Sivan v. North Australasian Co.*, 2 H. & C. 180.

signature, and purported to have been drawn and indorsed by one person, and also indorsed by another from whom the plaintiff received it, but before it had been so drawn and indorsed, and whilst it was a mere blank paper with a bill stamp and defendant's signature upon it, it was stolen from defendant's drawer, and therefore never had been given to the drawer or anyone from whom he received it to be negotiated in any way as a bill of exchange, it was held that the negligence of the defendant was not the proximate cause of the transaction, and that therefore he was not liable (*f*). So also negligence in the custody of a draft, or in its transmission by post, will not disentitle the owner of it to recover the draft or its proceeds from one who has wrongfully obtained possession of it (*g*). So also in a case where a fraudulent transfer of stock had been effected by means of a power of attorney improperly sealed with the seal of a corporation by the secretary who had custody of the seal, whereby he was enabled to commit the forgery, it was held that there was not such negligence as to deprive the plaintiff of his right to insist that the transfer was invalid, that to have the effect of depriving him of such right there must be negligence in or immediately connected with the transaction itself, that if there was negligence in the custody of the seal, it was very remotely connected with the act of transfer, and that the transfer was not a necessary or ordinary or likely result of that negligence (*h*). So also where transfers had been executed by the owner of shares in blank as to the particular shares, and the blanks had been fraudulently filled up by the broker with shares not intended by the transferor to pass, and the shares had been sold, it was held that the transfer was void, and that the original owner was entitled to have the shares delivered up and their registration in the name of the purchaser restrained (*i*).

The law relating to negotiable instruments stands on peculiar grounds. The law relating to these instruments is part of the law

(*f*) *Barxendule v. Bennett*, 3 Q. B. D. 525.

(*g*) *Arnold v. Cheque Bank*, 1 C. P. D. 587. See *Hunter v. Walters*, 7 Ch. 87.

(*h*) *Bank of Ireland v. Evans' Charities*, 5 H. L. 410.

(*i*) *Taylor v. Great Indian Peninsula Railway Co.*, 4 D. & J. 574.

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merchant, which in order that the negotiability of such instruments, which is of the very essence of their commercial utility, shall not be impaired, establishes that if a man once puts his name to such an instrument, he shall be liable to a *bonâ fide* owner without notice in respect of what may be added to give effect in negotiating the instrument, notwithstanding this may be done in the absence of authority or even for the purpose of fraud (*k*).

In the case of equitable interests in personal estate, or choses in action, a purchaser or other incumbrancer, who fails to give notice of his interest to the person in possession of the fund, will be postponed to an incumbrancer, though subsequent in date, who gives notice (*l*). But this rule has no application whatever to real estate. As between equitable incumbrancers of real estate, he whose security is prior in date, is entitled to priority over a person who takes a subsequent security, notwithstanding that the latter may have been beforehand in giving the party in possession of the estate notice of his security (*m*). An equitable incumbrancer on real estate is not as against another equitable incumbrancer postponed by any absence of activity in asserting his legal right, except such as amounts to fraud (*n*).

(*k*) 2 H. & C. 189, *per* Cockburn, C. J. See *Foster v. Mackinnon*, L. R. 4 C. P. 712.

(*l*) *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, *ib.* 30; *Foster v. Blackstone*, 1 M. & K. 297; *Martin v. Sedgwick*, 9 Beav. 333; *Etty v. Bridges*, 2 Y. & C. C. C. 486; *Thompson v. Tomkins*, 2 Dr. & Sm. 8;

Lloyd v. Banks, 3 Ch. 490; *Saffron Walden, &c., Society v. Rayner*, 14 Ch. D. 410; *Dannfather's Claim*, 16 Ch. D. 179.

(*m*) *Jones v. Jones*, 8 Sim. 642; *Wiltshire v. Rabbits*, 14 Sim. 76.

(*n*) *Rooper v. Harrison*, 2 K. & J. 103.

CHAPTER III.

PRESUMPTIVE OR CONSTRUCTIVE FRAUD.

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BESIDES that kind of fraud which consists in misrepresentation, express or implied, there is another which will be presumed, when parties to a transaction do not stand upon the equal footing on which parties to a transaction should stand (*a*). The general theory of law in regard to acts done and contracts made by parties affecting their rights and interests, being that, in order to bind them there must be a free and full consent, and consent being an act of reason accompanied with deliberation, transactions, in which one of the parties is not as free and voluntary an agent as the other, or does not apprehend the meaning and effect of what he is doing, want the very qualities which are essential to the validity of all transactions (*b*). In order that there should be consent, it is essential that the consent should be given with reflection and with knowledge, freely, without restraint or surprise. Fraud, therefore, whether consisting in misrepresentation, concealment, violence, duress, or constraint, will nullify consent (*c*). It is upon this principle that when a person, who from his state of mind, age, weakness, or other peculiar circumstances, is incapable of exercising a free discretion, is induced by another to do any act which may tend to the injury of himself or his representatives, that other shall not be allowed to derive any benefit from his improper conduct. The equitable rule is of universal application that where a man is not a free agent, or is not equal to protecting himself, the court will protect him (*d*).

(*a*) *Edwards v. Meyrick*, 2 Ha. s. 2, n. 38.
68.

(*b*) Story, Eq. Jur. s. 222. (*d*) *Evans v. Llewellyn*, 1 Cox,
340; *Crowe v. Ballard*, 1 Ves. Jr.
(*c*) Toull. Cod. Civ., liv. 3, tit. 3, 215; *Casborne v. Barsham*, 2 Beav.

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Lunacy, idiotey,
&c.

It is upon the general ground that there is a want of rational and deliberate consent that the contracts of idiots, lunatics, and other persons *non compotes mentis* are generally deemed invalid by a court of equity. The mere fact, however, that a man is in a state of lunacy, or is even in confinement, will not *per se* induce the Court to interfere, if it be distinctly shown that the transaction was for his own benefit, that no coercion or imposition was used, and that he knew clearly what he was doing (*e*); and so an executed contract where parties have been dealing fairly and in ignorance of the lunacy, will not be set aside, if injustice would be done to the other side and the parties cannot be placed *in statu quo*, or in the position in which they stood before the transaction (*f*). But this rule is not applicable to a case where the question is whether the deed of a lunatic altering the provisions of a settlement is invalid (*g*).

The same rule prevails at law. To prove lunacy is not enough to avoid a contract. A contract entered into *bonâ fide* and in the ordinary course of business, is not void by reason of one of the parties having been at the time a lunatic (*h*). To vitiate the contract it must appear that the other party was aware of the fact of lunacy and took advantage of it (*i*).

A party claiming under a deed is not bound to prove the sanity of the person executing it. The burden of proof lies on the other side (*k*).

Imbecility,
mental incapacity,
&c.

Independently of that degree of imbecility which will render a man legally *non compos*, a conveyance may be impeached for mere weakness of intellect, provided it be coupled with other

76; *Baker v. Monk*, 4 D. J. & S. 388; *Williams v. Bayley*, 1 E. & I. App. Ca. 200; *Slater v. Nolan*, 1 R. 11 Eq. 367; *Armstrong v. Armstrong*, ib. 8 Eq. 1.

(*e*) *Selby v. Jackson*, 6 Beav. 192, 204. See *Towart v. Sellers*, 5 Dow, 231; *Nelson v. Duncombe*, 9 Beav. 211; *Snook v. Watts*, 11 Beav. 105; *Stedman v. Hart*, Kay, 607.

(*f*) *Niell v. Morley*, 9 Ves. 478, 482; *Williams v. Wentworth*, 5

Beav. 325; *Jacobs v. Richards*, 18 Beav. 300; *Price v. Berrington*, 3 Mac. & G. 486; *Campbell v. Hooper*, 3 Sm. & G. 153.

(*g*) *Elliott v. Ince*, 7 D. M. & G. 475.

(*h*) *Molton v. Camroux*, 4 Exch. 17.

(*i*) *Beavan v. McDonnell*, 10 Exch. 184.

(*k*) *Jacobs v. Richards*, 18 Beav. 305.

circumstances to show that the weakness, such as it is, has been taken advantage of by the other party; but the mere fact that a man is of weak understanding or is in intellectual capacity below the average of mankind, if there be no fraud, or no undue advantage be taken, is not of itself an adequate ground to set aside a transaction (*l*). Till a man be declared legally *non compos*, a deed executed by him is good (*m*). The common law has not drawn any discriminating line by which to determine how great must be the imbecility of mind to render a transaction void and how much intellect is necessary to support it (*n*). The boundaries between actual insanity and great mental weakness are so very narrow that the Court must judge of this in each case upon facts and circumstances (*o*).

With regard to what shall constitute mental capacity, the rule in equity is the same as the rule at law. "There cannot," said Lord Hardwicke, in *Bennett v. Wade* (*p*), "be two rules of judging in law and in equity upon the point of insanity;" and in *Osmond v. Fitzroy* (*q*), the Master of the Rolls said there was no such thing as an equitable incapacity, where there was a legal capacity (*r*).

If a man be drunk to the extent of complete intoxication, so as to be no longer under the guidance of reason, or is in a state of excitement from excessive drinking, almost amounting to madness, any transaction which he may enter into while he is in that state is invalid. If, however, the degree of intoxication

(*l*) *Blackford v. Christian*, 1 Knapp, 73; *Bull v. Mannin*, 3 Bligh, N. S. 1, 1 Dow. & Cl. 381; *Armstrong v. Armstrong*, 1 R. 8 Eq. 1.

(*m*) *Osmond v. Fitzroy*, 3 P. Wms. 129. See *Gartside v. Isherwood*, 1 Bro. C. C. 559; *Jacobs v. Richards*, 18 Beav. 300. Comp. *Evans v. Blood*, 3 Bro. P. C. 632.

(*n*) *Jackson v. King*, 4 Cow. (Amer.), 207; *Manby v. Bewicke*, 3 K. & J. 342.

(*o*) *Bennett v. Wade*, 9 Mod. 315. See *White v. Small*, 2 Ch. Ca. 103; *Bell v. Howard*, 9 Mod. 302; *Hudson*

v. Beauchamp, 3 Bligh, 20n.; *Addis v. Campbell*, 4 Beav. 401; *Harrod v. Harrod*, 1 K. & J. 7; *Longmate v. Ledger*, 2 Giff. 163. See as to want of assent arising from partial insanity, monomania, delusion, &c., &c., *Dew v. Clarke*, 5 Russ. 167; *Waring v. Waring*, 6 Moo. P. C. 341; *Creagh v. Blood*, 2 J. & L. 509. See also *Steel v. Culley*, 1 Keen, 620.

(*p*) 2 Atk. 327.

(*q*) 3 P. Wms. 130.

(*r*) See *Manby v. Bewicke*, 3 K. & J. 342.

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falls short of such complete intoxication, he cannot have relief, unless it appear that he was drawn in to drink by the contrivance of the other party, and that an unfair advantage was taken of his situation (*s*). The rule at law on the subject agrees with the rule in equity (*t*).

Infancy.

The rule is the same both at law and in equity with respect to the general incapacity of infants to enter into a binding contract. A man who enters into a contract during his minority is not either at law or in equity bound thereby after his majority on the mere ground that without any false assertion on his part the other party believed him to be of age (*u*). But if an infant by a false and fraudulent representation that he is of full age induces a man to enter into a contract with him, he is bound in equity (*x*). Infancy is not in equity an excuse for fraud. An infant who is old and cunning enough to contrive or carry on a fraud is bound in the same manner as if he were an adult (*y*). It is not necessary that he should actively encourage fraud. It is enough if he be privy to it. If an infant knowing his rights stands by and seeing another in treaty for the purchase of his estate gives no notice of his title, he will not be permitted afterwards to avoid the purchase (*z*). An infant cannot be allowed by a Court of equity to take advantage of his own fraud (*a*). Where an infant had obtained from

(*s*) *Cory v. Cory*, 1 Ves. 19; *Cooke v. Clayworth*, 18 Ves. 16; *Say v. Barwick*, 1 V. & B. 195; *Butler v. Mulvihill*, 1 Bligh, 137; *Lightfoot v. Heron*, 3 Y. & C. 586; *Nagle v. Baylor*, 3 Dr. & War. 60; *Shaw v. Thackeray*, 1 Sim. & G. 539; *Wiltshire v. Marshall*, 14 W. R. 602; *Cox v. Smith*, 19 L. T. N. S. 517. See *Addis v. Campbell*, 4 Beav. 401; *Martin v. Pycroft*, 2 D. M. & G. 800.

(*t*) *Gore v. Gibson*, 13 M. & W. 623, 626; *Molton v. Camroux*, 4 Exch. 17, 19; *Hawkins v. Bone*, 4 F. & F. 313.

(*u*) *Stikeman v. Dawson*, 1 De G. & Sim. 105.

(*x*) *Cory v. Gertken*, 2 Madd. 40; *Wright v. Snowce*, 3 De G. & Sm. 321; *Ex parte Unity Bank*, 3 D. & J. 63; *Hannah v. Hodgeyson*, 30 Beav. 23. Comp. *Ex parte Taylor*, 8 D. M. & G. 254; *Nelson v. Stocker*, 4 D. & J. 458; but see *Bartlett v. Wells*, 1 B. & S. 836; *Lempriere v. Lange*, 12 Ch. D. 678.

(*y*) *Watts v. Cresswell*, 9 Vin. Ab. 415; *Erroy v. Nicholas*, 2 Eq. Ca. Ab. 489; *Arnot v. Biscoe*, 1 Ves. 95; per Lord Hardwicke, *Beckett v. Cordley*, 1 Bro. C. C. 358; but see *Sundererson v. Marr*, 1 H. Bl. 75.

(*z*) *Savage v. Foster*, 9 Mod. 37.

(*a*) *Clarke v. Cobley*, 2 Cox, 173.

a creditor of his wife two promissory notes, in which he was indebted to him before marriage, on giving his bond to the creditor, he was ordered to give back the notes on his pleading infancy when sued on the bond (*b*). Where an infant charged his reversionary interest in a fund with payment of a sum lent to him upon his promissory note, and executed a statutory declaration that he was then of full age, and after attaining full age he mortgaged his interest in the fund for an amount exceeding what was ultimately available without disclosing the fact of the prior charge: the Court held that the charge given by the infant during his infancy and incapacity to contract was avoided by the subsequent mortgage executed by him when of full age and capable of contracting to a mortgagee without notice (*c*).

In the absence of proof of the exercise of undue influence on the part of the donee or of the existence of the relation of guardian and ward between the donee and the donor, a gift of her property within a month before her death by an infant aged twenty years, of business habits, firm will, and fully capable of managing her affairs, to a relation with whom she had been residing since her father's death, for a period of five months until her own death, was held not invalid (*d*).

At law a married woman is under an absolute incapacity to bind herself by any engagement. Her separate existence is not contemplated, but is merged by the coverture in that of the husband. But in equity the case is wholly different. Her separate existence, both as regards her liabilities and her rights, is acknowledged in equity to the extent of the property which she enjoys for her separate use. In respect of such property she is capable of disposition and of doing other acts as if she were a *feme sole* (*e*). In respect of property not settled to her separate use a married woman cannot bind herself in equity in matter of contract any more than she can at law, but coverture

(*b*) *Ib.* See *Jones v. Kearney*, 1 Dr. & War. 166.

(*c*) *Inman v. Inman*, 15 Eq. 264.

(*d*) *Taylor v. Johnstone*, 19 Ch. D. 603.

(*e*) *Vaughan v. Vanderstegen*, 2 Drew. 370; *Johnson v. Gallagher*, 3 D. F. & J. 494; but see now 45 & 46 Vict. c. 75.

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is no excuse in equity for a fraud (*f*). The acquiescence however of a married woman in a transaction will not bind her, if the person with whom the transaction was entered into knew that she was a married woman (*g*).

Inequality of footing between parties to a contract.

The principle which vitiates a contract with an incapacitated person has been extended in equity to cases where from the peculiar relation which subsists between the parties, or from the influence which the one party has acquired over the other, the freedom of action which is essential to the validity of all transactions is overcome, and the equal footing on which parties to a transaction should stand is destroyed (*h*).

Principle as to dealings between parties standing in a fiduciary relation to each other.

If the relation between the parties is one of a fiduciary nature, transactions between them are watched by a Court of equity with more than ordinary jealousy. The duty of a person who fills a fiduciary position being to protect the interests which are confided to his care, he may not avail himself of the influence which his position gives him for the purposes of his own benefit, and to the prejudice of those interests which he is bound to protect. It is a rule of equity that no man can be permitted to take a benefit where he has a duty to perform which is inconsistent with his acceptance of the benefit (*i*). Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by the one and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had subsisted (*j*). "The obtaining property," said

(*f*) *Savage v. Foster*, 9 Mod. 37; Giff. 157; *Barrett v. Hartley*, 2 Eq. 789.

(*i*) *Robinson v. Pett*, 3 P. Wms. 249; *Ex parte Larking*, 4 Ch. D. 566; *Bagnal v. Carlton*, 6 Ch. D. 371.

(*g*) *Nicholl v. Jones*, 36 L. J. Ch. 554.

(*h*) See *Cusborne v. Barsham*, 2 Beav. 76; *Edwards v. Meyrick*, 2 Ha. 60; *Longmate v. Ledger*, 2

(*j*) *Tate v. Williamson*, 2 Ch. 61; *Bagnal v. Carlton*, 6 Ch. D. 371.

James, L.J., in *Moxon v. Payne* (*k*), "or of any benefit through the medium and unconscientious abuse of influence by a person in whom trust and confidence are placed is a fraud of the gravest character (*l*).

The rule of equity which prohibits a man, who fills a position of a fiduciary character, from taking a benefit from the person towards whom he stands in such a relation, stands upon a motive of general public policy, irrespective of the particular circumstances of the case. The rule is founded on considerations as to the difficulty which must, from the condition of the parties, generally exist of obtaining positive evidence as to the fairness of transactions which are peculiarly open to fraud and undue influence. The policy of the rule is to shut the door against temptation (*m*).

The rule does not however go the length of avoiding all transactions between parties standing in a fiduciary relation and those towards whom they stand in such relation. All that a Court of equity requires is that the confidence which has been reposed be not betrayed. A transaction between them will be supported, if it can be shown to the satisfaction of the Court that the parties were, notwithstanding the relation, substantially at arms' length and on an equal footing, and that nothing has happened which might not have happened had no such relation existed. The burthen of proof lies in all cases upon the party who fills the position of active confidence to show that the transaction has been fair. If it can be shown to the satisfaction of the Court that the other party had competent and disinterested or independent advice, or that he performed the act or entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power of influence to which the relation gave rise, the transaction will be supported (*n*). A man

(*k*) 8 Ch. 887.

(*l*) *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 127.

(*m*) *Herne v. Merres*, 1 Vern. 465 ; *Ayliffe v. Murray*, 2 Atk. 59 ; *Robinson v. Pett*, 3 P. Wms. 251 ; *Benson*

v. Heathorn, 1 Y. & C. C. C. 342 ; *Aberdeen Railway Co. v. Blaikie*, 1 Macq. 461.

(*n*) *Gibson v. Jeyes*, 6 Ves. 278 ; *Giddings v. Giddings*, 3 Russ. 241 ; *Hunter v. Atkins*, 3 M. & K. 113 ;

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standing in a fiduciary relation, if dealing with the confiding party, is bound to communicate all the information he has acquired respecting the property, the subject of the transaction, which it was material for him to know in order to enable him to judge of the value of the property (*o*). But the absence of a competent and disinterested legal adviser may of itself be fatal to the transaction (*p*).

The principles which govern the case of dealings of persons standing in a fiduciary relation apply to the case of persons who clothe themselves with a character which brings them within the range of the principle (*q*), or who take instruments, securities, or monies with notice that they have been obtained by a person filling a position of a fiduciary character from a person towards whom he stands in such relation (*r*).

In judging of the validity of transactions between persons standing in a confidential relation to each other, the material point to be considered is whether the person conferring a benefit had competent and independent advice. The age or capacity of the person conferring the benefit and the nature of the benefit are of little importance in such cases. They are important only where no such confidential relation exists (*s*). The general principle, however, as to the incapacity of a person who stands in a fiduciary relation to take a benefit from the party towards whom he stands in such a relation, admits of some limitation. A mere trifling gift to a person standing in a con-

Edwards v. Meyrick, 2 Ha. 60 ; *Billage v. Southee*, 9 Ha. 540 ; *Hoghton v. Hoghton*, 15 Beav. 288 ; *Allfrey v. Allfrey*, 1 Mac. & G. 99 ; *Smith v. Kay*, 7 H. L. 750 ; *Rhodes v. Bate*, 1 Ch. 252 ; *Tate v. Williamson*, 2 Ch. 55.

(*o*) *Ib.* ; *New Sombbrero Phosphate Co. v. Erlanger*, 5 Ch. D. 75 ; *Bagnal v. Carlton*, 6 Ch. D. 371 ; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394 ; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 922.

(*p*) *Rhodes v. Bate*, 1 Ch. 252 ; *King v. Anderson*, 1 R. S Eq. 637.

(*q*) *Tate v. Williamson*, 2 Ch. 55 ; *New Sombbrero Phosphate Co. v. Erlanger*, 5 Ch. D. 75 ; *Bagnal v. Carlton*, 6 Ch. D. 371 ; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394 ; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 922 ; 17 Ch. D. 127.

(*r*) *Ardylglasse v. Pitt*, 1 Vern. 238 ; *Molony v. Kernan*, 2 Dr. & War. 31 ; *Especy v. Lake*, 10 Ha. 260 ; *Berdoe v. Dawson*, 34 Beav. 603 ; *Rolfe v. Gregory* 4 D. J. & S. 576 ; *Wyse v. Lambert*, 16 Ir. Ch. 379. Comp. *Rhodes v. Bate*, 1 Ch. 260.

(*s*) *Rhodes v. Bate*, 1 Ch. 252.

fiducial relation, or a mere trifling liability incurred in favour of such person, cannot stand in the same position as a gift of a man's whole property, or a liability involving it, would stand in. In such cases the Court will not interfere to set them aside upon the mere fact of a confidential relation and the absence of proof of competent and independent advice. The Court requires, before it will undo the benefit conferred, some proof not merely of influence derived from the relation, but of *mala fides*, or of undue or unfair exercise of the influence (*t*).

After the termination of the fiduciary relation, it is open to the parties to deal on the same terms as strangers (*u*); but if a relation of confidence be once established, either some positive act or some complete case of abandonment must be shown in order to determine it. The mere fact that the relation is not called into existence is not sufficient of itself to determine it (*v*). If the confidential relation between the parties has not terminated at the commencement of the negotiation, the principles which govern the case of dealings between parties standing in a fiduciary relation continue to operate (*y*). Although indeed the confidential employment may have ceased, the disability will continue so long as the reasons on which it is founded continue to operate (*z*). A man, for instance, who has in the course of a fiduciary employment acquired some peculiar knowledge as to the property of his employer cannot, after the cessation of the relation, use the knowledge so acquired for his own benefit and to the prejudice of the other (*a*). But although a person may have been employed or consulted on one occasion, this will not of itself constitute a confidential relation in respect of a subsequent transaction, occurring at a future and somewhat distant time (*b*).

A common instance of the application of the rule that a man

Dealings between trustee and cestui que trust.

(*t*) *Ib.* See *Beasley v. Magrath*, 2 Sch. & Lef. 35; *Mitchell v. Homfray*, 8 Q. B. D. 587.

(*u*) *Tate v. Williamson*, 2 Ch. 65. See *Beaden v. King*, 9 Ha. 532; *Mitchell v. Homfray*, 8 Q. B. D. 587.

(*v*) *Rhodes v. Bate*, 1 Ch. 260.

(*y*) *Tate v. Williamson*, 2 Ch. 65. (*z*) *Carter v. Palmer*, 8 Cl. & Fin. 657.

(*a*) *Ib.*; *Holman v. Loynes*, 4 D. M. & G. 270; *Ex parte Larking*, 4 Ch. D. 566.

(*b*) *Rhodes v. Bate*, 1 Ch. 259.

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who fills a position of a fiduciary character cannot derive a benefit from the person towards whom he stands in such relation, is in the case of actual trustees. It is the duty of a trustee to use his best exertions for the advantage of the *cestui que trust*. He may not place himself in a situation in which his interests will come into conflict with that which his duty requires him to do. Any personal benefit which he may gain by availing himself of his fiduciary character must be acquired by a dereliction of duty and will enure for the benefit of the trust estate (*c*). There is no more sacred rule of equity than that a trustee cannot so execute a trust as to have the least benefit from it himself (*d*). No trustee who buys up an incumbrance on the estate of which he is trustee can ever as against the trust estate make a profit out of it (*e*). The restraint on any personal benefit to the trustee is not confined to his dealings with the estate, but extends to remuneration for services and prevents him from receiving anything beyond the payment of his expenses, unless there be an express stipulation to the contrary (*f*). There may be cases in which the Court will establish an agreement made with a trustee for a certain allowance beyond the term of his trust, but the Court will be extremely cautious and wary in doing so. The Court looks upon trusts as honorary and a burden on the honour and conscience of the party, and not as taken with mercenary motives (*g*).

But there is no rule which incapacitates a trustee from dealing

(*c*) *Holt v. Holt*, 1 Ch. Ca. 190; *Ex parte Lacey*, 6 Ves. 625; *Ex parte James*, 8 Ves. 337, 344; *D'Albiac v. D'Albiac*, 16 Ves. 123; *Hamilton v. Wright*, 9 Cl. & Fin. 111; *Broughton v. Broughton*, 5 D. M. & G. 164; *Vaughton v. Noble*, 30 Beav. 34; *Crosskill v. Bower*, 32 Beav. 86. A lease obtained by a trustee or executor in his own name, even in the absence of fraud, and upon the refusal of the lessor to grant a new lease to the *cestui que trust*, shall be held upon trust for the person

entitled to the old lease. *Keech v. Sandford*, Sel. Ca. Ch. 61.

(*d*) *Forbes v. Ross*, 2 Cox, 116.

(*e*) *Ex parte Larking*, 4 Ch. D. 566.

(*f*) *Robinson v. Pett*, 3 P. Wms. 249; *Moore v. Frowd*, 3 M. & C. 46; *Bainbrigge v. Blair*, 8 Beav. 588; *Broughton v. Broughton*, 5 D. M. & G. 160; *Harbin v. Darby*, 28 Beav. 325; *Crosskill v. Bower*, 32 Beav. 86; *Burrett v. Hartley*, 2 Eq. 789.

(*g*) *Ayliffe v. Murray*, 2 Atk. 59.

with the *cestui que trust* in respect of the trust estate. A trustee for sale may purchase the trust estate, if the *cestui que trust* fully and clearly understands with whom he is dealing and makes no objection to the transaction, and the trustee fairly and honestly discloses all that he knows respecting the property and gives a just and fair price, and does not seek to secure surreptitiously any advantage for himself (*h*). But the transaction becomes impeachable, if there is any secret or underhand dealing on the part of the trustee. However fair it may be in other respects, the transaction cannot be supported, if the *cestui que trust* does not clearly and distinctly understand that he is dealing with the trustee. A trustee cannot under any circumstances be allowed to deal with himself on behalf of the *cestui que trust* surreptitiously and without his knowledge and assent. It is immaterial that he may take no advantage from the bargain. It may be that the terms on which he attempts to deal with the trust estate are as good as could have been obtained from any other quarter. They may even be better, but so inflexible is the rule, that no inquiry can be made as to the fairness or unfairness of the transaction. It is enough that the act has a tendency to interfere with the duty of protecting the trust estate which the trustee has taken upon himself to perform. The policy of the rule is to shut the door against temptation. It makes no matter whether the transaction relates to real estate, or personalty, or mercantile matters, for the disability arises not from the subject matter, but from the obligation under which a trustee lies to do his utmost for the *cestui que trust* (*i*). It makes no difference in the application of the prin-

(*h*) *Ayliffe v. Murray*, 2 Atk. 59; *Clarke v. Sicule*, 2 Ed. 134; *Ex parte Lacey*, 6 Ves. 626; *Ex parte James*, 8 Ves. 348; *Coles v. Trecothick*, 9 Ves. 246; *Ex parte Bennett*, 10 Ves. 381; *Randall v. Errington*, ib. 422; *Morse v. Royal*, 12 Ves. 355; *Downes v. Grazebrook*, 3 Mer. 208; *Knight v. Marjoribanks*, 2 Mac. & G. 10; *Luff v. Lord*, 11 Jur. N. S. 50; *Dover v. Buck*, ib. 580.

(*i*) *Fox v. Maereth*, 2 Bro. C. C. 400, 2 Cox, 320, 4 Bro. P. C. 258; *Ex parte Lacey*, 6 Ves. 627; *Ex parte James*, 8 Ves. 348; *Ex parte Bennett*, 10 Ves. 394; *Randall v. Errington*, ib. 423; *Att.-Gen. v. Earl of Clarendon*, 17 Ves. 500; *Gregory v. Gregory*, Coop. 201; *Woodhouse v. Meredith*, 1 J. & W. 222; *Baker v. Carter*, 1 Y. & C. 250; *Grover v. Hugell*, 3 Russ. 428; *Bailey*

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ciple that the sale was by public auction (*k*), or that the purchase was made through another person (*l*), or that the purchase was made from a co-trustee (*m*), or that the trustee may have purchased as agent for another person (*n*), or that a third person may by previous arrangement with the trustee have been the purchaser in trust for the separate use and benefit of the wife of the trustee (*o*). If the transaction is in itself fair and the *cestui que trust* knows that the person with whom he is dealing is the trustee, and there is nothing to shew that the trustee wished to take an advantage of the *cestui que trust*, it is not incumbent on the trustee to disclose how much he gave for the property which he sells to the trustee (*p*).

The application of the principle is limited to dealings with the trust estate. In all matters unconnected with the subject of the trust the parties are fully competent with each other as strangers (*q*).

Nor will the principle operate after the relation of trustee and *cestui que trust* is clearly dissolved, but a man who has been a trustee cannot, after the termination of the relation, be allowed to avail himself for his own benefit, and to the prejudice of the party for whom he has been trustee, of any information which he may have acquired during the existence of the

v. *Watkins*, cit. 6 Bligh, 275; *Re Bloye's Trust*, 1 Mac. & G. 490, affd. as *Lewis v. Hillman*, 3 H. L. 607; *Knight v. Marjoribanks*, 2 Mac. & G. 12; *Hamilton v. Wright*, 9 Cl. & Fin. 111; *Aberdeen Railway Co. v. Blaikie*, 1 Macq. 461; *Parkinson v. Hambury*, 2 D. J. & S. 450; *Ridley v. Ridley*, 34 L. J. Ch. 463; *Franks v. Bollans*, 37 L. J. Ch. 155.

(*k*) *Campbell v. Walker*, 5 Ves. 678; *Ex parte James*, 8 Ves. 348; *Ex parte Bennett*, 10 Ves. 393; *Sanderson v. Walker*, 13 Ves. 602; *York Buildings Co. v. McKenzie*, 8 Bro. P. C. 42, 3 Pat. Sc. Ap. 378; *Bailey v. Watkins*, cit. 6 Bligh, 275; *Downes v. Grusebrook*, 3 Mer. 207; *Grover v.*

Hugell, 3 Russ. 428; *Adams v. Sworder*, 2 D. J. & S. 44.

(*l*) *Sanderson v. Walker*, 13 Ves. 602; *Adams v. Sworder*, 2 D. J. & S. 44; *Bagnal v. Carlton*, 6 Ch. D. 371.

(*m*) *Hall v. Noyes*, cit. 3 Ves. 748, 3 Bro. C. C. 483; *Whichcote v. Lawrence*, 3 Ves. 740.

(*n*) *Ex parte Bennett*, 10 Ves. 381, 400; *Gregory v. Gregory*, Coop. 201; *Ex parte Grylls*, 2 Dea. & Ch. 290.

(*o*) *Davoue v. Fanning*, 2 Johns. Ch. (Amer.), 252.

(*p*) *Chesterfield, &c., Colliery Co. v. Black*, 26 W. R. 207.

(*q*) *Knight v. Marjoribanks*, 2 Mac. & G. 12. 2 H. & Tw. 308.

relation (*r*). Subject to this limitation a man who has acted in a fiduciary character may, on divesting or discharging himself of the trust, purchase the property in respect of which he has filled a fiduciary position (*s*). If a man cannot by an act of his own discharge himself of the trust so as to enable him to purchase, the Court will, under particular circumstances, divest him of the character and enable him to purchase (*t*). If the trust property is taken entirely out of a man's hands, and all his authority over it put an end to by the interposition and act of law, as in the case of a sale by execution, there is no reason why he should not be able to purchase. The principle upon which a trustee is debarred from purchasing does not apply to such a case (*u*). The assignee of an insolvent debtor, for instance, may purchase the debtor's estate when sold by the sheriff (*x*). So also a creditor taking out execution may purchase the property upon a sale by the sheriff (*y*). But a man

(*r*) *Ex parte Lacey*, 6 Ves. 627; *Coles v. Trecothick*, 9 Ves. 246; *Ex parte Bennett*, 10 Ves. 394; *Morse v. Royal*, 12 Ves. 373; *Ex parte Larking*, 4 Ch. D. 566.

(*s*) *Ex parte James*, 8 Ves. 337; *Sanderson v. Walker*, 13 Ves. 601; *Downes v. Grazebrook*, 3 Mer. 200. The expression "shaking off" the character of trustee, or "dissolving the relation" of trustee, used in some of the cases, does not seem to amount to more than that the transaction takes place with the consent of the parties beneficially interested. *Ex parte James*, 8 Ves. 352; *Coles v. Trecothick*, 9 Ves. 234, 246; *Morse v. Royal*, 12 Ves. 373; *Downes v. Grazebrook*, 3 Mer. 208; *Chalmer v. Bradley*, 1 J. & W. 68. In *Austin v. Chambers*, 6 Cl. & Fin. 1, where it was said that a man might, on shaking off the character of a trustee, purchase the trust estate, the solicitor was not employed in the sale by his client, and was himself a judgment creditor. A trustee cannot be

allowed to purchase the trust estate by his retirement from the trust with that object in view. *Spring v. Pride*, 12 W. R. 510.

(*t*) *Campbell v. Walker*, 5 Ves. 681. See *Ex parte James*, 8 Ves. 348; *Sanderson v. Walker*, 13 Ves. 602; *Mulvany v. Dillon*, 1 Ba. & Be. 418; *Ex parte Harrison*, Buck, 17; *Ex parte Bage*, 4 Madd. 460; *Anon.*, 2 Russ. 350; *Ex parte Morland*, Mont. & M. 76.

(*u*) *Prevost v. Gratz*, Peters C. C. (Amer.), 378; *Fisk v. Sarber*, 6 Watts & Serg. (Amer.), 18. See *Ex parte Farley*, 3 Dea. & Ch. 110; *Austin v. Chambers*, 6 Cl. & Fin. 1; *Beaulen v. King*, 9 Ha. 499. Comp. *York Buildings Co. v. McKenzie*, 3 Pat. Sc. App. 398.

(*x*) *Fisk v. Sarber*, 6 Watts & Serg. (Amer.), 18. See *Ex parte Morland*, Mont. & M. 76.

(*y*) *Stratford v. Twynam*, Jac. 418; *Chambers v. Waters*, 3 Sim. 42; *S. C. Waters v. Groom*, 11 Cl. & Fin. 684.

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standing in a fiduciary character with respect to the property at a judicial sale, cannot purchase unless the entire responsibility of obtaining the highest price had been taken out of his hands (*z*). If he continues under any duty in respect of the subject matter of the sale, he is incapacitated from purchasing (*a*). Nor will the transaction be allowed to stand, if there appears to have been any unfairness in his conduct with regard to the sale (*b*).

Directors and
promoters of
companies.

The principle which affects dealings between trustee and *cestui que trust* is not confined to the case of trustees properly so called, but extends to other persons invested with a like fiduciary character, such as the directors or promoters of a company (*c*).

The director of a company is in a fiduciary position towards the company of which he is a director, and is bound to use his best endeavours for the advantage of the company. He may not place himself in a position in which his interests will come into conflict with that which his duty requires him to do. Any personal benefit which he may gain by availing himself of his fiduciary character must be acquired by a dereliction of duty, and will enure for the benefit of the company (*d*). If he makes any profit on account of transactions of business when he is acting for the company, he must account for it to the company (*e*). So also, if acting for himself, he proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company (*f*). Where the articles of a joint-stock association declared that if a director had any interest in a contract proposed for acceptance by the

(*z*) *Van Epps v. Van Epps*, 9 Paige Ch. (Amer.), 237; *Jewett v. Miller*, 6 Seld. (Amer.), 402.

(*a*) *Fisk v. Sarbor*, 6 Watts & Serg. (Amer.), 18. See *Ex parte Bennett*, 10 Ves. 393; *Ex parte Farley*, 3 Dea. & Ch. 110.

(*b*) *Lord Cranstoun v. Johnstone*, 3 Ves. 182, 5 Ves. 277; *Pereus v. Johnson*, 3 Sm. & G. 119.

(*c*) *Benson v. Heathorn*, 1 Y. & C. C. C. 326; *York & North Midland Railway Co. v. Haulson*, 16 Beav.

485; *Great Luxembourg Railway Co.*, 25 Beav. 587; *Aberdeen Railway Co. v. Blaikie*, 1 Macq. 461.

(*d*) *Ib.*; *Hay's Case*, 10 Ch. 600; *Ex parte Larking*, 4 Ch. D. 568.

(*e*) *Imperial Mercantile Credit Association v. Coleman*, 6 E. & I. App. Ca. 189; *Weston's Case*, 10 Ch. D. 579.

(*f*) *Imperial Mercantile Credit Association v. Coleman*, 6 E. & I. App. Ca. 189.

association, he should declare his interest, it was held that he must declare the nature of his interest, and that the words were not satisfied by a mere declaration that he had an interest in the matter (*g*). Nor can he retain a consideration received by him from the promoters as an inducement to become a director. If the consideration has been a gift of fully paid up shares, he may be compelled not only to restore the shares, but to account to the company for the highest value to be attributed to them since they have been in his possession (*h*). He is further chargeable with interest on the highest value of the shares (*i*).

Nor can a director, after a company has ended in disaster, turn his office into profit at the expense of those whose interests he was bound to protect, but which he has failed to protect. Where, accordingly, after a company has gone into liquidation, a director purchased debentures of the company at a discount, he was not allowed to prove for more against the company than he had actually paid (*k*).

If, moreover, directors of a company having to exercise a fiduciary power choose to place themselves in such a position that their interests pull one way while their duty is plainly to do something quite different, and for that reason they abstain from exercising that power, they will be held to all the same consequences as though that power had been exercised (*l*).

There is no difference in principle between a profit made by a director after he has become a director and profit through a bargain made by him at the time when he becomes a director, with a person who is proposing to enter into a contract with the company of which he is a director (*m*).

Where, accordingly, before the formation of a company for the purchase of certain property, the vendors agree with a certain person that he should become a director of the company, they providing him with forty shares necessary to qualify him, and

(*g*) *Ib.*

(*h*) *M'Kay's Case*, 2 Ch. D. 1 ;
Pearson's Case, 5 Ch. D. 336.

(*i*) *Nant-y-glo, &c., Ironworks Co.*
v. Grave, 12 Ch. D. 738. See *Met-*

calfe's Case, 13 Ch. D. 815.

(*k*) *Ex parte Larking*, 4 Ch. D.
566.

(*l*) *Gilbert's Case*, 5 Ch. 565.

(*m*) *Hay's Case*, 10 Ch. 600.

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the arrangement between them was such that the payment for the shares so provided came out of the funds of the company, the Court held that, he being a director of the company, could not retain for his own benefit monies so paid him by the vendors; that the monies had never ceased to be the monies of the company; that there had been, in fact, no payment by him in respect of his shares, and that he was liable as a contributory in respect of those shares (*n*).

Promoters of
companies.

"The word 'promoters,'" said Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co. (o)*, "is not used in the Companies Act, 1862, 25 & 26 Vict. c. 89. It is, however, a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company. Neither does the Act impose any duty on those promoters to have regard to the interests of the company which they are thus empowered to create. But it gives them almost an unlimited power to make the corporation subject to such regulations as they please, and for such purposes as they please, and to create it with a managing body whom they select, having powers such as they choose to give to their managers, so that the promoters can create such a corporation that the corporation, as soon as it comes into being, may be bound by anything, not in itself illegal, which the promoters have chosen. Those, therefore, who accept and use such extensive powers, which so greatly affect the interests of the corporation when it comes into being, are not entitled to disregard the interests of that corporation altogether. They must make a reasonable use of the powers which they accept from the legislature with regard to the formation of the corporation, and that requires them to pay some regard to its interests, and consequently they stand with regard to that corporation in what is commonly called a fiduciary relation to some extent."

"The promoters of a company," said Lord Cairns (*p*), "stand in a fiduciary position. They have in their hands the creation and moulding of a company; they have the power of defining how and when, and in what shape, and under what supervision

(*n*) *Hay's Case*, 10 Ch. 600.

(*p*) *Ib.* 1236.

(*o*) 3 App. Ca. 1268.

it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, it is incumbent on the promoters to take care that, in forming the company, they provide it with an executive—that is to say, a board of directors who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. There is no rule that the owner of property may not promote and form a joint-stock company and then sell his property to it ; but, if he does so, he is bound to take care that he sells it to the company through the medium of a board of directors, who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs not to the promoters but to some other person. It is the duty, moreover, of the promoters to take care that the contract for purchase of their property be submitted to the intelligent consideration of a complete number of independent directors. I cannot but regard a meeting at which two of the principal directors did not and could not attend, at which one who did attend and take part in the deliberation was at once a person buying and selling, when the legal adviser present and assisting was virtually another vendor, and when the two remaining directors are not shown to have had the means of exercising or to have exercised any intelligent judgment on the subject as little else than a mockery and a delusion.” “The contract in this case,” said Lord Selborne (q), “was adopted as the contract of the company (having been previously prepared for that purpose by the vendors), through the machinery of a board of directors of the vendors’ own creation who were so constituted as to be practically incapable of exercising, and who did not, in fact, exercise any independent judgment on the subject. All the documents were prepared by the vendors’ solicitor, who was also made solicitor to the company, and who participated in the vendors’ profit. Of the five directors named in the articles of

(q) *Ib.* 1260.

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association, two were absent from this country and were at that time practically incapable of acting; the other three were present when the contract was adopted, but of these one was the nominal vendor and the paid agent and trustee of the real vendor; another was a mere instrument in the hands of the vendors. The consideration was twice as much as the vendors had paid for the property a month before. Whether this was or was not an excessive price to be asked from the company is a question into which I do not enter. If there had been an independent purchaser and a real bargain, the vendors would have been at liberty to ask what price they pleased; and, if that purchaser had agreed to pay more for the property than it was worth, he could not complain. But there was, in fact, no such purchaser and no such bargain. The vendors themselves managed the whole thing, and they made those, who, through their means, undertook a trust for others, their passive instruments."

A person not a director may be a promoter of a company which is already incorporated, the capital of which, however, has not been taken up, and which is not yet in a position to perform the obligations imposed on it by its creators (*r*).

The 38th section of the Companies Act, 1867, does contain the word "promoters," but it imposes no fresh duty on them with regard to the company. It imposes a fresh duty towards, and gives new cause of action to, persons who take shares in the company as individuals: it does not affect the obligation of the promoters towards the corporation. The extent of the fiduciary relation which the promoters bear to the company is a very important consideration in construing the section (*s*).

If the promoters of a company are the owners of the property which they are selling to the company, they are bound, like other persons in a fiduciary position, to state in their prospectus that they are the owners, and to make a full and fair disclosure of their interest and position with respect to that property. It is not necessary in all cases that the price given by them for the

(*r*) *Emma Silver Mining Co. v. Phosphate Co.*, 3 App. Ca. 1269, per Lord Blackburn.
Lewis, 4 C. P. D. 407.

(*s*) *Erlanger v. New Sombbrero*

property should be stated ; but it is not fair in them to omit to state that they have just purchased the property at a very much smaller amount than they propose to sell it for to the company which they are promoting or causing to come into existence (*t*).

The concealment of an agreement whereby a benefit is secured to the promoter of a company out of the purchase-money is a fraudulent concealment. The promoter will not be allowed to keep the money. It amounts to an agreement by a vendor with an agent of an intended principal to give him a bribe to betray the interests of the principal (*u*). Though some time may have elapsed between the agreement and the formation of the company, the rule applies if the parties are still carrying out the scheme into which they have entered (*x*).

There is no difference in principle between money taken from the funds of a company by a secret bargain between the vendor and the promoters, and money so taken by secret bargain between the vendor, the promoters, and the contractors (*y*).

The principle which affects dealings between trustee and *cestui que trust* extends also to other persons invested with a like fiduciary character : such as executors and administrators (*z*) ; assignees of a bankrupt (*a*) ; commissioners of bankrupts and

Other fiduciary relations.

(*t*) *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73 ; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1269 ; *Bagnal v. Carlton*, 6 Ch. D. 371.

(*u*) *Re Hereford, &c., Engineering Co.*, 2 Ch. D. 621.

(*x*) *Ib.*

(*y*) *Treyeross v. Grant*, 2 C. P. D. 535, *per* Cockburn, C. J.

(*z*) *Pickering v. Pickering*, 2 Beav. 31 ; *Wedderburn v. Wedderburn*, 4 M. & C. 41 ; *Barton v. Hassard*, 3 Dr. & War. 461 ; *Alfrey v. Alfrey*, 1 Mac. & G. 87 ; *Smedley v. Varley*, 23 Beav. 359 ; *Prideaux v. Lonsdale*, 1 D. J. & S. 433 ; *De Cordova v. De Cordora*, 4 App. Ca. 702.

(*a*) *Ex parte Reynolds*, 5 Ves. 707 ; *Ex parte Hughes*, 6 Ves. 617 ; *Ex*

parte Lacey, *ib.* 625 ; *Ex parte James*, 8 Ves. 337 ; *Ex parte Bennett*, 10 Ves. 381 ; *Pooley v. Quilter*, 2 D. & J. 327. See *Adams v. Svrorder*, 2 D. J. & S. 44. Leave may be given by the court to the assignees to purchase the bankrupt's estate. *Ex parte James*, 8 Ves. 348 ; *Ex parte Buge*, 4 Madd. 460 ; *Anon.*, 2 Russ. 350 ; *Ex parte Serle*, 1 Gl. & Ja. 187 ; *Ex parte Beamont*, 1 Mont. & A. 304. In one case an assignee was removed in order that he might bid at a sale of the bankrupt's estate. *Ex parte Perks*, 3 M. D. & Deg. 385. The leave must be previously obtained. Before the court will entertain any such application on the part of the assignee, he must first obtain the consent of the creditors, at a meeting

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other judicial officers (*b*) ; committees of lunatics (*c*) ; governors of a charity (*d*) ; receivers (*e*) ; arbitrators (*f*) ; to a member of a corporation taking a lease of the corporate property (*g*), and many other cases (*h*). The disability extends in general to all persons who being employed or concerned in the affairs of another acquire a knowledge of his property (*i*). Partners in business of an assignee in bankruptcy are equally disqualified from purchasing with the assignee himself (*k*).

The principle does not, however, apply to the case of a mortgagee dealing with the mortgagor (*l*), nor to the case of a puisne mortgagee buying the mortgaged property from a prior mortgagee under the exercise of his power of sale (*m*) ; nor to the case of a tenant for life purchasing from trustees for sale under a power to be exercised with his consent (*n*) ; nor to the

called for the purpose of enabling them to assent to or dissent from the proposed purchase : *Ex parte Molineux*, 4 D. & C. 461 ; *Anon.*, 2 Russ. 350 ; and even then the court will not make the order, except under very special circumstances. *Ex parte Hodgson*, 1 Gl. & Ja. 14 ; *Ex parte Towne*, 4 D. & C. 519. In a case where the court refused to allow an assignee to bid, he was allowed to name the price he would give, if the property was not sold by auction, and afterwards to buy at that price. *Ex parte Holyman*, 8 Jur. 156. If a purchase by an assignee be found beneficial, it may be confirmed by the court. *Ex parte Gore*, 6 Jur. 1118, 7 Jur. 136.

(*b*) *Ex parte James*, 8 Ves. 338 ; *Ex parte Bennett*, 10 Ves. 381.

(*c*) *Wright v. Proud*, 13 Ves. 136.

(*d*) *Att.-Gen. v. Lord Clarendon*, 17 Ves. 500.

(*e*) *Alren v. Bond*, 1 Fl. & Kel. 196 ; *Eyre v. McDonnell*, 15 Ir. Ch. 534 ; *Boddington v. Langford*, ib. 558.

(*f*) *Blennerhassett v. Day*, 2 Ba.

& Be. 116.

(*g*) *Att.-Gen. v. Corporation of Cuskel*, 3 Dr. & War. 294.

(*h*) See *Ex parte Morgan*, 12 Ves. 6 ; *Grover v. Hugell*, 3 Russ. 428 ; *Greenlaw v. Hugell*, 3 Beav. 49 ; *Beuden v. King*, 9 Ha. 499 ; *Dimes v. Proprietors of Grand Junction Railway Co.*, 3 H. L. 759 ; *Denton v. Donner*, 23 Beav. 285 ; *Re Ronayne's Estate*, 13 Ir. Ch. 444.

(*i*) Sug. V. & P. 587, 14th ed., *supra*, p. 127.

(*k*) *Ex parte Burnell*, 7 Jur. 116.

(*l*) *Knight v. Marjoribanks*, 2 Mac. & G. 10, 2 H. & Tw. 308 ; *Dobson v. Land*, 8 Ha. 220 ; *Melbourne Banking Co. v. Brougham*, 7 App. Ca. 307 ; but *comp. Hickes v. Cooke*, 4 Dow. 16 ; *Downes v. Grazebrook*, 3 Mer. 200 ; *Re Bloye's Trust*, 1 Mac. & G. 490 ; *Martinson v. Clowes*, 21 Ch. D. 860.

(*m*) *Shaw v. Bunny*, 2 D. J. & S. 468 ; *Kirkwood v. Thompson*, ib. 613.

(*n*) *Howard v. Ducane*, T. & R. 81 ; *Dicconson v. Tulbot*, 6 Ch. 37. As tenant for life is placed by the

case of a tenant for life or mortgagor with power to sell or lease selling or leasing to a trustee for himself (*o*); nor does it operate to preclude a tenant for life from effecting a sale which will be advantageous to his own interest, if his conduct has been without blame and blemish (*p*); nor does the principle apply to the case of merely nominal trustees, such as trustees who have disclaimed (*q*), or trustees to preserve contingent remainders (*r*). Nor when property is sold in a foreclosure suit is the solicitor to some creditors of the mortgagee, one of whom has obtained a decree for the administration of the mortgagee's estate precluded from purchasing, though his name appeared on the particulars of sale as one of several solicitors from whom particulars of sale could be obtained (*s*).

But a mortgagee exercising his power of sale cannot purchase on his own account, nor can the solicitor of the mortgagee acting for him in the matter of the sale purchase on his own account. In a case where property was sold under their power of sale by mortgagees of a building society, it was held that the secretary of the society could not bid at the auction, though he stated he was buying on his own account (*t*).

If the tenant of charity lands happens to be a trustee, that is a circumstance to excite suspicion, if the land be of an inadequate value. At the same time it must be remembered that

Settled Land Act, 1882, s. 53, in the position of a trustee, he cannot safely purchase from or exchange with himself; but see Sug. V. & P. 692; Dart, V. & P. 37, as to tenant for life with power of sale in general. As tenant for life may purchase on a sale by the court after obtaining permission from the court: Dart, V. & P. 1195, he may, under the Settled Land Act, 1882, buy from himself with the sanction of the court, for which application may be made under sections 31 (3), 44. A purchase by tenant for life in the name of a third person, would be no better than if it were made in his

own name, indeed it would be rather indicative of fraud. Dart, V. & P. 41; *M'Pherson v. Watt*, 3 App. Ca. 263.

(*o*) *Bevan v. Habygood*, 1 J. & H. 222.

(*p*) *Hickley v. Hickley*, 2 Ch. D. 190.

(*q*) *Stacey v. Elph*, 1 M. & K. 195; *Chambers v. Waters*, 3 Sim. 42.

(*r*) *Parkes v. White*, 11 Ves. 209, 226.

(*s*) *Guest v. Smythe*, 5 Ch. 551.

(*t*) *Martinson v. Clowes*, 21 Ch. D. 860.

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the case of a charity estate is one in which of all others the security of the rent is the first object to be regarded. In such cases therefore the inadequacy of the rent reserved is less a badge of fraud than it would be in almost any other case (*u*).

Dealings between
solicitor and
client.

Considerations of a similar character apply to the case of transactions between persons standing to each other in the relation of solicitor and client (*x*). It is the duty of a solicitor to protect the interests of his client. The client is entitled to the full benefit of the best exertions of the solicitor. A solicitor may not bring his own personal interest in any way into conflict with that which his duty requires him to do (*y*), or make a gain for himself in any manner whatever at the expense of his client in respect of the subject of any transactions, connected with or arising out of the relation of solicitor and client, beyond the amount of just and fair professional remuneration to which he is entitled (*z*). A solicitor may not even enter into an agreement with a man to be his solicitor in a particular transaction upon the terms of getting a greater benefit than he would obtain by the costs which he is entitled to charge according to the rules of law (*a*). If, indeed, a solicitor be a trustee, he is not entitled to charge for professional services in respect of the trust estate (*b*).

A solicitor is not under any incapacity to purchase from or sell to a client. A solicitor may deal with a client or purchase a client's property even during the continuance of the relation, but the burthen of proof lies on him to show that the transac-

(*u*) *Ex parte Skinner*, 2 Mer. 457.

(*x*) See *Walmsley v. Booth*, 2 Atk. 39 ; *Newman v. Payne*, 2 Ves. Jr. 201 ; *Rhodes v. Beauvoir*, 6 Bligh, 195 ; *Casborne v. Parsham*, 2 Beav. 76 ; *Holman v. Loynes*, 4 D. M. & G. 270.

(*y*) *Lawless v. Mansfield*, 1 Dr. & War. 557, 631.

(*z*) *Wood v. Downes*, 18 Ves. 120 ; *Rhodes v. Beauvoir*, 6 Bligh, 195 ; *Champion v. Rigby*, Tambl. 421, 9 L.

J. Ch. N. S. 211 ; *Lyddon v. Moss*, 4 D. & J. 104 ; *Proctor v. Robinson*, 35 Beav. 335 ; *Tyrrell v. Bank of London*, 10 H. L. 26, 44.

(*a*) *Strange v. Brennan*, 15 L. J. Ch. 289 ; *Pince v. Beattie*, 32 L. J. Ch. 734. See *Re Whitcombe*, 8 Beav. 140 ; comp. *Lyddon v. Moss*, 4 D. & J. 104 ; *Galloway v. Corporation of London*, 4 Eq. 90.

(*b*) *Stanes v. Parker*, 9 Beav. 385 ; *Todd v. Wilson*, ib. 486.

tion has been perfectly fair (*c*). A prudent man would not deal with his client without the intervention of another solicitor, but there is no rule that a solicitor may not take such a course (*d*). He must, however, be prepared to show that he gave his client the same protection as he would have given him, if dealing with a stranger, and must satisfy the court that he has taken no advantage of his professional position, but has duly and honestly advised his client as an independent and disinterested adviser would have done, and has brought to his knowledge everything which he himself knew necessary to enable him to form a judgment in the matter, and he must in particular be able to show that a just and fair price has been given (*e*). He should, indeed, be prepared to show how the contract was entered into, who made the first offer, and what were the circumstances attending the transaction (*f*). The possibility of a speculative or contingent advantage does not fall within those communications which a solicitor is bound to disclose to his client, if the transaction has been in other respects fair, and the point was as much open to the observation of the one party as the other (*g*). If a solicitor be employed as

(*c*) *Supra*, p. 125.

(*d*) *Cutts v. Salmon*, 21 L. J. Ch. 750, per Lord St. Leonards; *Jones v. Price*, 20 L. T. 49. See *Watt v. Grove*, 2 Sch. & Lef. 503.

(*e*) *Gibson v. Jeyes*, 6 Ves. 277; *Montesquieu v. Sandys*, 18 Ves. 302; *Cane v. Lord Allen*, 2 Dow. 294; *Morgan v. Leves*, 4 Dow. 29, 47; *Molony v. L'Estrange*, Beat. 406; *Champion v. Rigby*, Tam. 421, 9 L. J. Ch. N. S. 211; *Uppington v. Bullen*, 2 Dr. & War. 185; *Edwards v. Meyrick*, 2 Ha. 60; *Higgins v. Joyce*, 2 J. & L. 282; *Spencer v. Topham*, 22 Beav. 573; *Holman v. Loynes*, 4 D. M. & G. 270; *Hesse v. Briant*, 6 D. M. & G. 623; *Savery v. King*, 5 H. L. 627; *Tomson v. Judge*, 3 Drew. 306; *Barnard v. Hunter*, 2 Jur. N. S. 1213; *Knight v. Bowyer*, 2 D. & J. 421, 445;

Gresley v. Mousley, 4 D. & J. 78, 3 D. F. & J. 433; *Lyddon v. Moss*, 4 D. & J. 104; *Morgan v. Higgins*, 1 Giff. 270; *Crowdy v. Day*, ib. 316; *Pearson v. Benson*, 28 Beav. 599; *Marquis of Clanricarde v. Henning*, 30 Beav. 175; *Beale v. Billing*, 13 Ir. Ch. 250; *Gibbs v. Daniel*, 4 Giff. 1; *Adams v. Sworder*, 2 D. J. & S. 44; *Rhodes v. Bate*, 1 Ch. 252; *Sterry v. Coombs*, 19 W. R. 964.

(*f*) *Jones v. Price*, 20 L. T. 49. See *Rhodes v. Bates*, 1 Ch. 252; see also *Moore v. France*, 9 Ha. 299, where a deed was set aside, though the solicitor derived no benefit from it.

(*g*) *Edwards v. Meyrick*, 2 Ha. 60. See *Montesquieu v. Sandys*, 18 Ves. 302; *Ramsbottom v. Parker*, 6 Madd. 6; *Holman v. Loynes*, 4 D. M. & G. 270; *Wentworth v. Lloyd*, 32 Beav. 467.

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an agent for sale or purchase, he may not purchase from or sell to himself surreptitiously without the knowledge or consent of his client (*h*). Though the transaction is one which in every respect might have been supported had the client known that the solicitor employed by him to sell was the purchaser, it cannot be supported if that fact has not been disclosed (*i*). If the sale be under a decree of the court, a solicitor employed in the cause, who wishes to purchase, should first obtain leave of the court (*k*). A solicitor employed in the sale of an estate should not bid for the estate though it may be merely for the purpose of preventing it going at an undervalue, unless he first obtain the leave of the court to do so. If he do so without the leave of the court and there is no higher bidder, he may, if the court thinks proper, be held to the purchase (*l*).

The rule that a solicitor who deals with a client is bound to prove the fairness of the transaction applies with peculiar force where the client is placed at a disadvantage from his being indebted to the solicitor, and gives him a security for the debt (*m*). If, however, the court is satisfied that the transaction has been on the whole fair and reasonable, and that no undue advantage has been taken, it will be supported, although there may have been some irregularities attending it (*n*). A solicitor

(*h*) *Ex parte James*, 8 Ves. 352; *Ex parte Bennett*, 10 Ves. 381; *Cane v. Lord Allen*, 2 Dow. 294; *Rhodes v. Beauvoir*, 6 Bligh, 195; *Sidny v. Ranger*, 12 Sim. 118; *Bloye's Trust*, 1 Mac. & G. 488; *Lewis v. Hillman*, 3 H. & L. 607; *Tyrrell v. Bank of London*, 10 H. L. 26, 44; *Adams v. Swarder*, 2 D. J. & S. 44.

(*i*) *Macpherson v. Watt*, 3 App. Ca. 256.

(*k*) *Sidny v. Ranger*, 12 Sim. 118.

(*l*) *Nelthorpe v. Pennyman*, 14 Ves. 517.

(*m*) *Proof v. Hines*, ca. t. Talb. 115; *Walmsley v. Booth*, 2 Atk. 29; *Draper's Co. v. Davis*, ib. 295; *Ward v. Hartpole*, cit. 3 Bligh, 470; *Newman v. Payne*, 2 Ves. Jr. 200; *Cooke v. Setree*, 1 V. & B. 126; *Daly*

v. Kelly, 4 Dow. 417, 430; *Casborne v. Barsham*, 2 Beav. 76; *Champion v. Rigby*, Taml. 421, 9 L. J. Ch. N. S. 211; *Bellamy v. Sabine*, 2 Ph. 425; *Lawless v. Mansfield*, 1 Dr. & War. 557; *Uppington v. Bullen*, 2 Dr. & War. 185; *Edwards v. Meyrick*, 2 Ha. 60; *Shaw v. Neale*, 20 Beav. 157; *Coleman v. Mellersh*, 2 Mac. & G. 309; *Holman v. Loynes*, 4 D. M. & G. 270; *Lyddon v. Moss*, 28 Beav. 598. See *Jones v. Thomas*, 2 Y. & C. 498; *Morgan v. Higgins*, 1 Giff. 270; *Re Foster*, 2 D. F. & J. 110; *Re Pugh*, 1 D. J. & S. 673.

(*n*) *Jones v. Roberts*, 9 Beav. 419; *Blagrave v. Routh*, 8 D. M. & G. 621. See *Cooke v. Setree*, 1 V. & B. 126; *Plenderleath v. Frazer*, 3 V. & B. 174; *Lawless v. Mansfield*, 1 Dr. &

who advances money to or has dealings with a client must be able to prove the advance of the money by some other evidence than the instrument creating the security (*o*). A solicitor cannot, under any circumstances, take security from his client for future costs (*p*), or for monies to be advanced for the purposes of a cause (*q*); but a security given by a client to his solicitor for past costs or for monies actually due will be supported if *bonâ fide* (*r*).

In dealing with a case where a solicitor has purchased from a client, the circumstances of his employment may be considered and the amount of influence estimated. In a case accordingly where no high degree of confidence existed, and not much influence had been acquired, the court, being satisfied that the conduct of the solicitor had been *bonâ fide*, and that the bargain was a fair one, the transaction was upheld (*s*).

The statement of an untrue consideration in a deed of purchase of sale between attorney and client is fatal to the deed. The court will never support a deed where an attorney is purchaser and the consideration is untruly stated (*t*).

The rule which throws upon a solicitor dealing with his client the burthen of proving the fairness of the transaction is not confined to cases where the solicitor is actually employed at the time, but may extend to cases where a solicitor has in the course of his employment on a previous occasion acquired or had the means of acquiring any peculiar knowledge as to the property (*u*). As a general rule, however, it no longer applies

War. 557; *Stedman v. Collett*, 17 Beav. 608; *Moss v. Bainbrigge*, 6 D. M. & G. 292. See *Cheslyn v. Dalby*, 2 Y. & C. 170; comp. *Lyddon v. Moss*, 4 D. & J. 104.

(*o*) *Morgan v. Leves*, 4 Dow. 46; *Morgan v. Evans*, 3 Cl. & Fin. 195; *Lawless v. Mansfield*, 1 Dr. & War. 557; *Gresley v. Mousley*, 3 D. F. & J. 433. See *Jones v. Thomas*, 2 Y. & C. 498; *Stuinton v. Carron Co.*, 24 Beav. 352.

(*p*) *Jones v. Tripp*, Jac. 322; *Williams v. Piggott*, ib. 598; *Booth*

v. Creswicke, 13 L. J. Ch. 217; *Coleman v. Mellersh*, 2 Mac. & G. 309. See *Pitcher v. Rigby*, 9 Pri. 79.

(*q*) *Uppington v. Bullen*, 2 Dr. & War. 184.

(*r*) *Cheslyn v. Dalby*, 2 Y. & C. 170; *Edwards v. Meyrick*, 2 Ha. 60.

(*s*) *Pisani v. Att.-Gen. of Gibraltar*, L. R. 5 P. C. 536.

(*t*) *Uppington v. Bullen*, 2 Dr. & War. 184. See *Holman v. Loynes*, 4 D. M. & G. 270.

(*u*) *Holman v. Loynes*, 4 D. M. & G. 270; *Gilbs v. Daniel*, 4 Giff. 1.

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after there has been an entire cessation of the relation (*x*); nor will it apply in cases where the transaction is entirely unconnected with the duty of the attorney (*y*). Nor will it apply with the same force where the relation though not terminated has been loosened and the influence consequent on the relation which formerly existed between the parties is not subsisting in its full and perfect force (*z*).

The relation of solicitor and client carries with it all its consequences, whether it arise from an already existing relation or be only created for the purpose of a particular transaction. But if it do not exist previously, and first arises in the particular transaction, it must be definitely established, and is not necessarily to be inferred (*a*).

The rule which throws upon a solicitor dealing with his client the burthen of proving the fairness of the transaction applies to the case of voluntary agreements, and not to a case where the solicitor is in the hostile attitude of an urgent and pressing creditor (*b*). Nor does the rule apply, where the transaction is totally disconnected with the relation, and concerns objects and things not embraced in or affected by or dependent upon that relation (*c*). The fact that the purchaser may be a solicitor, and that the vendor had no legal adviser, there having been no previous relation of solicitor and client between them, does not bring the case within the ordinary rule of the Court in such cases (*d*).

The rule with regard to gifts by a client to his solicitor is

See *Carter v. Palmer*, 8 Cl. & Fin. 657, 707.

(*x*) *Gibson v. Jeyes*, 6 Ves. 277; *Wood v. Downes*, 18 Ves. 120; *Montesquieu v. Sandys*, ib. 313; *Cane v. Lord Allen*, 2 Dow. 289; *Moss v. Bainbrigge*, 6 D. M. & G. 292. See *Dent v. Bennett*, 4 M. & C. 269, 277; *Carter v. Palmer*, 8 Cl. & Fin. 657; *Blagrove v. Routh*, 8 D. M. & G. 620.

(*y*) See *Jones v. Thomas*, 2 Y. & C. 519.

(*z*) *Moss v. Bainbrigge*, 6 D. M. &

G. 292.

(*a*) *Williamson v. Moriarty*, 19 W. R. 818.

(*b*) *Johnson v. Fesenmeyer*, 3 D. & J. 13; *Pearson v. Benson*, 28 Beav. 599. See *Moss v. Bainbrigge*, 6 D. M. & G. 292.

(*c*) *Montesquieu v. Sandys*, 18 Ves. 313; *Jones v. Thomas*, 2 Y. & C. 498; *Edwards v. Meyrick*, 2 Ha. 60, 68.

(*d*) *Edwards v. Williams*, 32 L. J. Ch. 763.

much stricter than the rule with regard to other dealings between them. Gifts from a client to a solicitor during the existence of the relation are absolutely invalid upon grounds of public policy. To render such a gift valid there must be a severance of the confidential relation. Nor indeed can a gift by a client to a solicitor after the cessation of the relation be supported unless the influence arising from the relation may be rationally supposed to have ceased also (*e*). There is no difference in principle between a gift to a man's wife and a gift immediately to himself, if the gift to the wife be effected by undue means on the part of the husband (*f*). The rule in respect to benefits conferred by will is different. A solicitor may take a benefit under the will of a client, although he may himself have prepared it, if no undue influence was exerted by him over the testator (*g*), and the will was not executed under any mistake or misapprehension caused by himself (*h*). But a solicitor cannot be allowed to take any benefit from his own professional ignorance. A solicitor is bound to have full professional knowledge and to give the information to his client. If a solicitor is employed to prepare a deed or to make a will, the law imputes to him a knowledge of all the legal consequences to result therefrom, and requires that he should distinctly and clearly point out to his client all those consequences from which a benefit may arise to himself from the instrument so prepared. If he fail to do so, he cannot as against his client or anyone claiming under him, derive any benefit under the instrument (*i*).

(*e*) *Wells v. Middleton*, 1 Cox, 112, 4 Bro. P. C. 245; *Newman v. Payne*, 2 Ves. Jr. 200; *Wright v. Proud*, 13 Ves. 137, per Lord Eldon; *Wood v. Downes*, 18 Ves. 120; *Goddard v. Carlisle*, 9 Pri. 169; *Ward v. Hartpole*, cit. 3 Bligh, 470; *Tomson v. Judge*, 3 Drew. 306; *Holman v. Loynes*, 4 D. M. & G. 270, 283; *Re Holmes's Estate*, 3 Giff. 337; *Gibbs v. Daniel*, 4 Giff. 1; *O'Brien v. Lewis*, 4 Giff. 221; *Morgan v. Minett*, 6 Ch. D. 638.

(*f*) *Goddard v. Carlisle*, 9 Pri. 169.

(*g*) *Walker v. Smith*, 29 Beav. 394.

(*h*) *Hindson v. Weatherill*, 5 D. M. & G. 301. See *Raworth v. Marriott*, 1 M. & K. 643.

(*i*) *Segrave v. Kirwan*, Beat. 157; *Macdonald v. Lillie*, 1 Bligh, 315; *Bulkley v. Wilford*, 2 Cl. & Fin. 102, 8 Bligh, N. S. 111; *Bayly v. Wilkins*, 3 J. & L. 630; *Nanney v. Williams*, 22 Beav. 452; *Greenfield v. Bates*, 5 Ir. Ch. 219.

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Accounts between solicitor and client stand upon different grounds from those between parties standing at arms' length. That which between others would be a conclusive settlement is not so between them. Settlement and payment of a bill, even though a long period may since have elapsed, is not conclusive, and will not bar an examination of the fairness of the demand. If the settlement were made during the pendency of the suit, the client must have been in some degree under the control of the solicitor, and a settlement under such circumstances may be opened (*k*).

The principles which apply in the case of dealings between solicitor and client are also applicable to the case of a counsel employed by a man as his confidential adviser (*l*); to the case of a man who has constituted himself the legal adviser of another (*m*), or has offered him legal advice in the matter (*n*); and to the case of the clerk of a solicitor who has acquired the confidence of a client of his master (*o*). In *Parnell v. Tyler* (*p*), where on a sale by a mortgagee the purchaser had employed a clerk of the solicitor of the mortgagee to bid for him, the transaction was set aside.

Dealings between
principal and
agent.

Considerations of a like nature apply to the case of persons standing in the relation of principal and agent. A person who is an agent for another undertakes a duty in which there is a confidence reposed and which he is bound to execute to the utmost advantage of the person who employs him. The principal is entitled to the full benefit of the best exertions of the agent. An agent cannot be allowed to place himself in a position which under ordinary circumstances might tempt him not to do that which is the best for his principal, or in which his

(*k*) *Lewes v. Morgan*, 5 Pr. 56; *Langstaffe v. Taylor*, 14 Ves. 263; *Crossley v. Parker*, 1 J. & W. 462.

(*l*) *Purcell v. Macnamara*, 14 Ves. 91; *McCabe v. Hussey*, 2 Dow. & Cl. 440, 5 Bligh, N. S. 715; *Carter v. Palmer*, 8 Cl. & Fin. 657, 707; *Brown v. Kennedy*, 33 Beav. 133, 4 D. J. & S. 217; *Corley v. Lord Stafford*, 1 D. & J. 238.

(*m*) *Tate v. Williamson*, 1 Eq. 528, 2 Ch. 65. See *Wyse v. Lambert*, 16 Ir. Ch. 379.

(*n*) *Davis v. Abraham*, 5 W. R. 465.

(*o*) *Hobday v. Peters*, 28 Beav. 349; *Nesbitt v. Berridge*, 32 Beav. 284.

(*p*) 2 L. J. Ch. N. S. 195.

interest and his duty will be in conflict. No agent in the course and execution of his agency can, without the knowledge and consent of his principal, be allowed to make any profit or advantage out of the matter of his agency and the business in which he is employed beyond the proper remuneration to which he is entitled for his services as agent (*q*).

There is no difference in principle between a profit made by an agent after he has become an agent and profit through a bargain made by him at the time when he becomes an agent with a person who is proposing to enter into a contract with his principal (*r*). An agent cannot bargain for any benefit derived from the subject on which he is employed without disclosing the fact to his principal (*s*). Commission received by an agent without the knowledge of his principal is looked on as a bribe. It is a profit which the principal has a right to extract from the agent whenever it comes to his knowledge (*t*). The rule is the same whether the remuneration received by the agent formed part of the original bargain, or was a present for services rendered (*u*).

There is no rule to prevent an agent from dealing with his principal in respect of the matter in which he is employed as agent. But an agent who seeks to uphold a transaction between himself and his principal must be able to show to the satisfaction of the Court that he gave his principal the same advice in the matter as an independent and disinterested adviser would have done, and that he made a full disclosure of all he knew respecting the property, and that the principal knew with whom he was dealing and made no objection to the transaction, and finally that the consideration was just and fair (*x*). However

(*q*) *East India Co. v. Henchman*, 1 Ves. Jr. 289; *Ex parte Hughes*, 6 Ves. 617; *York Buildings Co. v. McKenzie*, 3 Pat. Sc. Ap. 398, 3 Ross, L. C. Sc. 305; *Rothschild v. Brockman*, 2 Dow. & Cl. 188, 5 Bligh, N. S. 165; *Beck v. Kantorowicz*, 3 K. & J. 230; *Tyrell v. Bank of London*, 10 H. L. 26, 39; *Parker v. McKenna*, 10 Ch. 118; *Ex parte Larking*, 4

Ch. D. 566.

(*r*) *Hay's Case*, 10 Ch. 600.

(*s*) *Bagnall v. Carlton*, 6 Ch. D. 389.

(*t*) *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 456.

(*u*) *McKay's Case*, 2 Ch. D. 1.

(*x*) *York Buildings Co. v. McKenzie*, 3 Pat. Sc. Ap. 398, 3 Ross, L. C. Sc. 305; *Lowther v. Lowther*, 13 Ves.

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fair the transaction may be in other respects, any underhand dealing on the part of the agent will render it impeachable at the election of the principal. It is immaterial that the agent may have taken no advantage by the bargain. It is sufficient that he has not acted with that good faith which the Court requires, and has placed himself in a situation which might tempt an agent to allow his own interest to come into conflict with that which his duty requires him to do (*y*).

An agent who is employed to sell cannot become the purchaser surreptitiously and without the knowledge or assent of his employer (*z*); nor can an agent, who is employed to purchase, purchase secretly from himself or from his own trustee (*a*), or for his own benefit (*b*). The rule applies whether the agent employed to purchase was actually in the position of a vendor, or intended to place himself in that position (*c*). An agent for

103; *Watt v. Grove*, 2 Sch. & Lef. 492; *Woodhouse v. Meredith*, 1 J. & W. 204; *Lord Selsey v. Rhoades*, 2 Sim. & St. 41, 1 Bligh, N. S. 1; *Cane v. Lord Allen*, 2 Dow, 294; *Rothschild v. Brockman*, 2 Dow. & Cl. 188, 5 Bligh, N. S. 165; *Barker v. Harrison*, 2 Coll. 546; *Molony v. Kernan*, 2 Dr. & War. 31; *Trevelyan v. Charter*, 4 L. J. Ch. N. S. 209; *Charter v. Trevelyan*, 11 Cl. & Fin. 714, 732; *Mulhollen v. Marum*, 3 Dr. & War. 317; *Murphy v. O'Shea*, 2 J. & L. 422, 425; *Clarke v. Tipping*, 9 Beav. 284; *Bloye's Trust*, 1 Mac. & G. 488; *Lewis v. Hillman*, 3 H. L. 607; *Rhodes v. Bate*, 1 Ch. 252.

(*y*) *Gillett v. Peppercorne*, 3 Beav. 78; *Murphy v. O'Shea*, 2 J. & L. 422; *Charter v. Trevelyan*, 11 Cl. & Fin. 714; *Wilson v. Short*, 6 Ha. 383; *Hobday v. Peters*, 28 Beav. 349; *Tyrell v. Bank of London*, 10 H. J. 26; *Wentworth v. Lloyd*, 32 Beav. 467; *Parker v. M'Kenna*, 10 Ch. 118; *De Bussche v. Alt*, 8 Ch. D. 316.

(*z*) *York Buildings Co. v. M'Kenzie*, 3 Pat. Sc. Ap. 398, 3 Ross, L. C. Sc. 305; *Ex parte Hughes*, 6 Ves. 617; *Woodhouse v. Meredith*, 1 J. & W. 204; *Trevelyan v. Charter*, 4 L. J. Ch. N. S. 209; *Charter v. Trevelyan*, 11 Cl. & Fin. 714; *Murphy v. O'Shea*, 2 J. & L. 422; *Lewis v. Hillman*, 3 H. L. 607; *Parker v. M'Kenna*, 10 Ch. 118; *Macpherson v. Watt*, 3 App. Ca. 256.

(*a*) *East India Co. v. Henchman*, 1 Ves. Jr. 289; *Massey v. Davies*, 3 Ves. 317; *Rothschild v. Brockman*, 2 Dow. & Cl. 188; *Driscoll v. Bromley*, 1 Jur. 238; *Gillett v. Peppercorne*, 3 Beav. 78; *Barker v. Harrison*, 2 Coll. 546; *Bentley v. Craven*, 18 Beav. 75; *Tyrell v. Bank of London*, 10 H. L. 26; *Kimber v. Barber*, 8 Ch. 57.

(*b*) *Lees v. Nuttall*, 2 M. & K. 819; *Taylor v. Salmon*, 4 M. & C. 134. See *Carter v. Palmer*, 8 Cl. & Fin. 657; *Beck v. Kantorowicz*, 3 K. & J. 230; *Hobday v. Peters*, 28 Beav. 349.

(*c*) *Beck v. Kantorowicz*, 3 K. & J. 242.

sale, if he intends to purchase himself, or to take an interest in the purchase, is bound to tell his principal what share in the purchase he intends to take. He is bound to disclose to his principal the exact nature of his interest. It is not enough for him to say that he has an interest or to make statements such as would put the purchaser on inquiry (*d*). So also an agent who is employed to settle a debt or to make an arrangement cannot purchase up the debt or any charge upon the property which is the subject of the arrangement for his own benefit (*e*). So also an agent employed to effect an insurance is bound, in the absence of an agreement to the contrary, to account to his principal for any discount which may be allowed by the insurance office on the premiums paid (*f*). The disability extends to the case of a sub-agent or substitute employed by the agent (*g*), and to the case of a clerk of an agent who in the course of his employment has acquired a knowledge of the property of the principal (*h*).

The rule applies with peculiar stringency to the directors of joint-stock companies who are agents for the sales and purchases made by the company (*i*).

The rule that an agent dealing with his principal must impart knowledge acquired in his office does not apply where the relation has ceased and there is another agent with equal means of knowledge to guard the interest of the principal in the transaction (*j*). After the relation of principal and agent has wholly ceased, or the agent has divested himself of that character, the parties are restored to their competency to deal with each other (*k*). But an agent who has in the course of his employment acquired some peculiar knowledge as to the property cannot after the cessation of the relation use the know-

(*d*) *Dunne v. English*, 18 Eq. 524. 287.

(*e*) *Cane v. Lord Allen*, 2 Dow. 294 ; *Red v. Norris*, 2 M. & C. 361 ; *Carter v. Palmer*, 8 Cl. & Fin. 657, 11 Bligh, N. S. 397 ; *Hobday v. Peters*, 28 Beav. 349.

(*f*) *Queen of Spain v. Parr*, 39 L. J. Ch. 73.

(*g*) *De Bussche v. Alt*, 8 Ch. D.

(*h*) *Gardner v. Ogden*, 8 Smith (Amer.), 327.

(*i*) *Hay's Case*, 10 Ch. 600.

(*j*) *Scott v. Dunbar*, 1 Moll. 442.

(*k*) *Charter v. Trevelyan*, 4 L. J. Ch. N. S. 209. See *York Buildings Co. v. McKenzie*, 3 Pat. Sc. Ap. 379 ; *Parker v. McKenna*, 10 Ch. 118.

Chap. III. ledge so acquired for his own benefit and to the prejudice of his former client (*l*).

An agent, for instance, who in the course of his employment as such has discovered a defect in the title of his employer, cannot after the relation has ceased use his knowledge so gained to acquire a title for himself (*m*). Nor can a man who is employed as a confidential agent escape from liability under the pretence that the business has been entrusted to an agent and not to him, unless it can be shown that the agent was intended to act and in fact acted independently of him (*n*).

So long as a contract remains executory, and the trustee or agent has power either to enforce it or to rescind or alter it, so long as it remains in that state, a trustee or agent cannot repurchase the property from his own purchaser except for the benefit of his principal. There may be cases of agents for sale who when they have once made the contract have concluded their agency, such as the case of an auctioneer, who when he has knocked down the estate and made the written contract may be said to have terminated his agency. But even in that case the Court would look with considerable suspicion on a repurchase by such an agent as an auctioneer from the person to whom he sold the estate, because it would always be extremely difficult to find out whether there had not been some previous concert and understanding between them (*o*).

There is no rule preventing the same agent from acting for the opposing parties, but he must be able to satisfy the Court that the parties were substantially at arms' length in the transaction, and that there had been the utmost fairness throughout (*p*).

When a bribe is given or a promise to bribe is made to a person in the employment of another by some one who has contracted or is about to contract with the employer, with a

(*l*) *Carter v. Palmer*, 8 Cl. & Fin. 657; *Holman v. Lognes*, 4 D. M. & G. 270.

(*m*) *Ringo v. Binns*, 10 Peters (Amer.), 269.

(*n*) *Rhodes v. Bates*, 1 Ch. 252.

(*o*) *Parker v. McKenna*, 10 Ch.

126, *per* Mellish, L. J.

(*p*) *Hesse v. Briant*, 6 D. M. & G. 623; *Garvey v. McMinn*, 9 Ir. Eq. 526. See *Rhodes v. Beauvoir*, 6 Bligh, N.S. 195; *Matthie v. Edwards*, 16 L. J. Ch. 405.

view to induce the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforceable at law, whatever the effect on the mind of the person bribed may be. It is quite immaterial that the employer has not in fact been damaged. It is sufficient that the consideration upon which the promise was made was intended to be a corrupt one (*q*). Any surreptitious dealing between one principal and the agent of the other principal is a fraud. The defrauded principal is entitled at his option to have the contract rescinded, or if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him (*r*).

A gift by a man to a person who has been for many years his confidential agent and adviser is valid, unless the party who seeks to set it aside can show that some advantage was taken by the agent of the relation in which he stood to the donor. If the conduct of the agent in the matter appears to have been fair, honest, and *bonâ fide*, it is immaterial that the deed of gift may have been drawn up by his solicitor without the intervention of a disinterested third party (*s*). The rule with respect to the capacity of an agent to accept a gift from his principal is not so strict as it is in the case of attorney and client, trustee and *cestui que trust*, and guardian and ward. The relation in which the parties stand to each other being of a sort less known and definite than in those other cases, the jealousy is diminished (*t*).

The principles which govern the case of dealings between principal and agent apply as between partners. It is the duty of partners towards each other to refrain from all concealment in the transaction of the partnership business. If a partner be guilty of any such concealment, and derive a benefit therefrom, he will be treated in equity as a trustee for the firm, and compelled to account to his co-partners (*u*).

Partners.

(*q*) *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 550.

(*r*) *Panama, &c., Telegraph Co. v. India Rubber, &c., Telegraph Works Co.*, 10 Ch. 526.

(*s*) *Hunter v. Atkins*, 3 M. & K. 113; *Nicol v. Vaughan*, 1 Cl. &

Fin. 495. See *Wyse v. Lambert*, 16 Ir. Ch. 379; *Rhodes v. Bate*, 1 Ch. 252.

(*t*) *Hunter v. Atkins*, 3 M. & K. 113; but see *Hobday v. Peters*, 28 Beav. 349.

(*u*) *Russell v. Austwick*, 1 Sim. 52;

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This principle will prohibit all clandestine bargains by one partner for his own exclusive benefit, made in contemplation of establishing a partnership with other persons (*x*). So each partner is bound to refrain (in the absence of consent by his co-partners) from engaging in any other business or speculation which will deprive the partnership of a portion of the skill, industry, diligence or capital which he is bound to employ therein. In other words, he is not at liberty to deal on his own private account in any matter or business which is obviously at variance with his primary duty to the partnership. The object of this prohibitory rule is to withdraw from each partner the temptation to bestow more attention and to exercise a sharper sagacity in respect to his own purchases and sales and negotiations than he does in respect to the concerns of the partnership in the same or in a conflicting line of business. Hence if one partner should secretly carry on another trade, or the same trade, for his own advantage, especially if actually rather than presumably to the injury of the partnership interests, or should divert the capital or funds of the partnership to such secret or sinister purposes, he will be compelled to account in equity for all the profits made thereby (*y*). So if one partner should purchase articles on his own private account in some special trade and business in which the partnership was engaged, the purchase being to the injury of the partnership, he would be held to account in equity for his profits (*z*). In cases of this sort an injunction may be had to restrain the partner from carrying on any such trade or business without the consent of his co-partners (*a*).

A partner cannot make a secret profit out of dealings with the firm. He cannot, for example, supply the firm with goods which he has himself bought for his own use at a lower price without informing his partners of the facts (*b*). Nor can a

Maddeford v. Austwick, ib. 89, 2 M. K. 279.

(*x*) *Farcott v. Whitehouse*, 1 R. & M. 132, 148; *Hichens v. Congreve*, 4 Russ. 562.

(*y*) *Glassington v. Thwaites*, 1 Sim. & St. 124, 133; *Burton v. Wookey*, 6

Madd. 367; *England v. Curling*, 8 Beav. 129.

(*z*) *Burton v. Wookey*, 6 Madd. 367.

(*a*) *Glassington v. Thwaites*, 1 Sim. & St. 124.

(*b*) *Bentley v. Craven*, 18 Beav. 75.

partner treat privately and behind the backs of his co-partners for a lease of the premises where the joint trade is carried on for his own benefit. A lease obtained in his own name will be held a trust for the partnership (*e*). A partner in business intending to purchase the interest of his co-partner, must, if he has had the management of the business or the keeping of the accounts, make a full disclosure of the state of the business, otherwise the purchase will be liable to impeachment by the co-partner. In a case accordingly where a partner who had superintended exclusively the accounts of the business, agreed to purchase his co-partner's share therein for a sum which he knew from accounts in his possession to be inadequate, the transaction was set aside on the ground that the purchaser had concealed the state of these accounts (*d*).

There is nothing fiduciary between the surviving partner and the dead man's representative, except that they may sue each other in equity. There are certain legal rights and duties which attach to them, but it is a mistake to apply the word "trust" to the legal relation which is thereby created (*e*).

The rule of equity with respect to dealings between guardian and ward is extremely strict (*f*), and imposes a general inability on the parties to deal with each other (*g*). Where the relation of guardian and ward is subsisting between two parties, if a gift or anything in the nature of a gift proceeds from the ward towards the guardian, when the ward has just come of full age, such transactions are subject to be viewed with the utmost jealousy by courts of equity. It is almost impossible that transactions of such a nature can be sustained, unless the party claiming the benefit of the gift can show to the satisfaction of the Court that his influence has not been misapplied in the particular transaction. Unless it appears to be a spontaneous act on the part of the ward, or unless he was informed in all

Dealings between
guardian and
ward.

(*e*) *Featherstonhaugh v. Fenwick*, 17 Ves. 311; *Wilson v. Greenwood*, 1 Wil. C. C. 236; *Clegg v. Fishwick*, 1 Mac. & G. 294; *Clegg v. Edmondson*, 1 D. M. & G. 787.

(*d*) *Muddiford v. Austwick*, 1 Sim. 89.

(*e*) *Knox v. Gye*, 5 E. & I. App. Ca. 656.

(*f*) *Hylton v. Hylton*, 2 Ves. 548, 549; *Hatch v. Hatch*, 9 Ves. 292.

(*g*) See *Darson v. Massey*, 1 B. & B. 226. Tutor rem pupilli emere non potest. Dig. xviii. tit. 1, leg. 347.

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the particulars of the nature, character, and probable consequence of his proceeding, such a transaction cannot stand (*h*). Transactions between guardian and ward cannot be allowed to stand, even although they may have taken place after the guardianship has come to a close, unless the influence which is presumed to arise from the relation has ceased to exist (*i*). The influence may continue to exist for a considerable time after the actual relation has ceased to exist (*k*). As long as the accounts between the parties have not been fully settled or the estate still remains in some sort under the control of the guardian, the influence will be presumed to exist (*l*). The influence will indeed be presumed to exist, unless there is distinct evidence of its determination (*m*). After the relation has entirely ceased, not merely in name but in fact, and a full and fair settlement of all transactions arising out of the relation has been made, and sufficient time has elapsed to put the parties in a position of complete independence to each other, there is no objection to any bounty or grant conferred by the ward on his former guardian (*n*).

It is not necessary for the application of the principle that the relation of guardian and ward should exist in perfect

(*h*) *Archer v. Hudson*, 15 L. J. Ch. 211; *Mulhollen v. Marum*, 3 Dr. & War. 317. See *Oldin v. Samborn*, 2 Atk. 15; *Beasley v. Magrath*, 2 Sch. & Lef. 35.

(*i*) *Hylton v. Hylton*, 2 Ves. 548, 549; *Hatch v. Hatch*, 9 Ves. 292; *Carey v. Carey*, 2 Sch. & Lef. 173; *Dawson v. Massey*, 1 B. & B. 219; *Aylward v. Kearney*, 2 B. & B. 478; *O'Neill v. Hammill*, Beat. 618; *Maitland v. Irving*, 15 Sim. 437; *Archer v. Hudson*, 15 L. J. Ch. 211; *Maitland v. Backhouse*, 17 L. J. Ch. 121; *Especy v. Lake*, 10 Ha. 260. See *Rhodes v. Bate*, 1 Ch. 252.

(*k*) *Hatch v. Hatch*, 9 Ves. 292; *Aylward v. Kearney*, 2 B. & B. 463; *O'Neill v. Hammill*, Beat. 618; *Reverett v. Harvey*, 1 Sim. & St. 502;

Maitland v. Irving, 15 Sim. 437; *Archer v. Hudson*, 15 L. J. Ch. 211; *Maitland v. Backhouse*, 17 L. J. Ch. 121; *Davies v. Davies*, 9 Jur. N. S. 1002.

(*l*) *Hylton v. Hylton*, 2 Ves. 547; *Dawson v. Massey*, 1 B. & B. 229. See *Steadman v. Palling*, 3 Atk. 423; *Mellish v. Mellish*, 1 Sim. & St. 138; *Reverett v. Harvey*, ib. 502; *Matthew v. Brise*, 14 Beav. 345; *Especy v. Lake*, 10 Ha. 260.

(*m*) *Rhodes v. Bate*, 1 Ch. 252. See *Archer v. Hudson*, 15 L. J. Ch. 211.

(*n*) *Hylton v. Hylton*, 2 Ves. 547, 549. See *Beasley v. Magrath*, 2 Sch. & Lef. 35; *Ross v. Steele*, 1 Ir. Eq. 171.

strictness of terms, or that the guardian should be a guardian appointed by the Court of Chancery or nominated by the father. If the young person lives with and is brought up or under the care, influence, and control of a near relative of mature age—if the relation of guardian and ward thus subsist between them—the principle is equally applicable (o).

The principle applies to the case of a third party who makes himself a party with the guardian who obtains a security from his ward (p).

The case of parent and child comes within the same principle (q). The influence which a parent has naturally over a child makes it the duty of the Court to watch over and protect the interests of the child. A child may deal with or make a gift to a parent, and such dealing or gift is good, if it be not tainted with parental influence operating on the hopes or fears or necessities of the child. A child is presumed to be under parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent upholding the transaction or maintaining the gift to disprove the exercise of parental influence by showing that the child was really a free agent and had competent independent advice, or had at least competent means of forming an independent judgment and fully understood what he was doing and was desirous of doing it (r). The principle applies for at least a year after the coming of age of the child, and will extend beyond the year, if

(o) *Beasley v. Magrath*, 2 Sch. & Lef. 31; *Revett v. Harvey*, 1 Sim. & St. 502; *Mulhellen v. Marum*, 3 Dr. & War. 317; *Alfrey v. Alfrey*, 1 Mac. & G. 98; *Espcy v. Lake*, 10 Ha. 260, 262; *Prideaux v. Lonsdale*, 1 D. J. & S. 433; *Everitt v. Everitt*, 10 Eq. 410; *Kempson v. Ashbee*, 10 Ch. 15.

(p) *Espcy v. Lake*, 10 Ha. 260; *Kempson v. Ashbee*, 10 Ch. 15.

(q) *Cusborne v. Barsham*, 2 Beav. 76.

(r) *Carpenter v. Heriot*, 1 Ed. 338; *Heron v. Heron*, 2 Atk. 160; *Young*

v. Peachey, ib. 254; *Hoghton v. Hoghton*, 15 Beav. 278; *Hartopp v. Hartopp*, 21 Beav. 259; *Baker v. Brulley*, 7 D. M. & G. 597; *Wright v. Vanderplank*, 8 D. M. & G. 135, 146; *King v. King*, 1 D. & J. 671; *Bury v. Oppenheim*, 26 Beav. 594; *Savery v. King*, 5 H. L. 627, 635; *Jenner v. Jenner*, 2 D. F. & J. 359; *Berdoe v. Dawson*, 34 Beav. 603; *Chambers v. Crabbe*, ib. 457; *Potts v. Surr*, ib. 543; *Turner v. Collins*, 7 Ch. 329; *Gray v. Binny*, 7 Dec. of Court of Session, 4th series, 333.

Parent and child.

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the dominion lasts (*s*). The Court will indeed presume the continuance of the influence, unless there is a distinct evidence of its determination (*t*). The *onus probandi* which lies on the father to show that the child had independent advice, and that he executed a deed with full knowledge of its contents, and with the free intention of giving the father the benefit conferred by it, extends to a volunteer claiming through the father, and to any person taking with notice of the circumstances which raise the equity, and no farther. If a solicitor purports to act in the transaction on behalf of the child, a purchaser for value is entitled to assume that he has given the child proper advice, even although he be acting as the father's solicitor. There is no absolute rule in such a transaction that the father and child must be advised by different solicitors (*u*). Where the parental influence is disproved or that influence has ceased, a dealing between parent and child or a gift from a child to a parent stands on the same footing as any other dealing or gift (*x*). The entreaty of a sick father to a child does not amount to undue influence (*y*). Nor is the mere fact of a daughter soon after coming of age voluntarily giving securities to a creditor of her father in payment of his debts of itself ground for imputing undue influence to the father (*z*).

Transactions between parent and child which proceed upon arrangements between them for the settlement of the family property, or which tend to the peace and security of the family and the avoidance of litigation, do not come within the ordinary rules of the Court with respect to parental influence. If the settlement is one by which the parent acquires no benefit, not already possessed by him, and be a reasonable arrangement and

(*s*) 7 H. L. 772, *per* Lord Cranworth. See *Walker v. Symonds*, 3 Sw. 1, 72; *Hoghton v. Hoghton*, 15 Beav. 300; *Wright v. Vanderplank*, 8 D. M. & G. 135; *Bury v. Oppenheim*, 26 Beav. 594; *Burdock v. Dawson*, 34 Beav. 603; *Chambers v. Crabbe*, *ib.* 457.

(*t*) *Rhodes v. Bate*, 1 Ch. 252.

(*u*) *Bainbrigge v. Brown*, 18 Ch.

D. 188.

(*x*) *Wright v. Vanderplank*, 8 D. M. & G. 135, 146; *Bury v. Oppenheim*, 26 Beav. 594.

(*y*) *Farrant v. Blanchford*, 1 D. J. & S. 107.

(*z*) *Thornber v. Sheard*, 12 Beav. 589. See as to undue influence, *infra*, p. 158 *et seq.*

for the benefit of the family and be not obtained through misrepresentation or suppression of the truth, it will be supported even although it may appear that the parent did exert parental influence and authority over the son to procure his execution of it. If the child is fully aware of the nature and effect of the transaction, it is of no consequence that he may not have had the advice of a separate solicitor; nor can he be heard to say that he executed the settlement with precipitancy. If the settlement be for the benefit of the family, a court of equity will not inquire into the degree of influence which may have been exerted (*a*). Arrangements between members of a family to assist their several objects or relieve their several necessities are affected by so many peculiar considerations and are influenced by so many different motives that they are withdrawn from the ordinary rules by which the Court is guided in adjudicating between other parties (*b*). The Court does not minutely weigh the considerations on one side or the other. Even ignorance of rights may not avail to impeach the transaction. But transactions in the nature of a bounty from a child to a parent soon after coming of age are viewed by the Court with jealousy (*c*). If the parent gains some advantage by the transaction which he did not previously possess, the general principles with respect to parental influence apply, and the transaction cannot be supported, unless it can be shown that the child knew what he was doing and was desirous of doing it and was not unduly influenced by his father (*d*). The

(*a*) *Tweddell v. Tweddell*, T. & R. 1; *Bellamy v. Sabine*, 2 Ph. 425; *Cooke v. Burtchall*, 2 Dr. & War. 165; *Wallace v. Wallace*, ib. 452; *Hoghton v. Hoghton*, 15 Beav. 278, 305; *Baker v. Bradley*, 7 D. M. & G. 597; *Dimsdale v. Dimsdale*, 3 Drew. 556; *Jenner v. Jenner*, 2 D. F. & J. 354; *Potts v. Surr*, 34 Beav. 543; *Williams v. Williams*, 2 Ch. 295; *Fane v. Fane*, 20 Eq. 698. See *Tennent v. Tennents*, 2 Sc. App. Ca. 9.

(*b*) *Bellamy v. Sabine*, 2 Ph. 425; *Head v. Godlee*, Johns. 536.

(*c*) *Baker v. Bradley*, 7 D. M. & G. 620. See *Tennent v. Tennents*, 2 Sc. App. Ca. 9.

(*d*) *Heron v. Heron*, 2 Atk. 160; *Hoghton v. Hoghton*, 15 Beav. 278; *Baker v. Bradley*, 7 D. M. & G. 620; *Savery v. King*, 5 H. L. 627; *Fane v. Fane*, 20 Eq. 698; *Tabor v. Cunningham*, 24 W. R. 156; *Gray v. Binny*, 7 Dec. of Court of Session, 4th series, 333; see *Wallace v. Wallace*, 3 Dr. & War. 452; *Jenner v. Jenner*, 2 D. F. & J. 359; *Potts v. Surr*, 34

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same considerations apply where a third person takes a benefit under a deed executed by a son in favour of his father (*e*).

If, however, the person who takes the benefit is a member of the family and the parent himself takes no benefit, the transaction will not be set aside, even though considerable pressure may have been used by the parent to induce the son to execute it. In *Wycherley v. Wycherley* (*f*), where the father of a family with some warmth of temper insisted upon a deed being executed by a son for the benefit of his two sisters, Lord Northington would not set it aside (*g*).

Dealings in
other cases of
a fiduciary
character.

The principles which govern the case of dealings of persons standing in a fiduciary relation apply generally to the case of persons who clothe themselves with a character which brings them within the range of the principle (*h*). A man who possesses the confidence of another will not be allowed by a court of equity to take advantage of that situation, although the relation of solicitor and client or principal and agent be not strictly constituted between them. It is enough that a man be merely consulted as a confidential friend (*i*). It is immaterial that no definite relation may exist between the parties (*k*).

Undue influence.

The principle on which a court of equity acts in relieving against transactions on the ground of inequality of footing between the parties is not confined to cases where a fiduciary relation can be shown to exist, but extends to all the varieties of relations in which dominion may be exercised by one man over another, and applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed (*l*). In cases where a fiduciary relation does not subsist between the parties, the

Beav. 543; *Berdoe v. Dawson*, ib. 603.

(*e*) *Berdoe v. Dawson*, ib.

(*f*) 2 Eden, 175.

(*g*) *Bentley v. Mackay*, 31 Beav. 151.

(*h*) *Tate v. Williamson*, 2 Ch. 55.

See *Greenlaw v. King*, 5 Jur. 18;

Giddings v. Giddings, 3 Russ. 241;

Waters v. Bailey, 2 Y. & C. C. C.

219; *Tanner v. Elworthy*, 4 Beav.

487; *Smith v. Kay*, 7 H. L. 750;

Coulson v. Allison, 2 D. F. & J. 521;

Prudeau v. Lonsdale, 1 D. J. & S.

433.

(*i*) *Taylor v. Obce*, 3 Pri. 83. See

Darley v. Singleton, Wight. 25.

(*k*) *Ib.*; *Butler v. Miller*, L. R. 1

Ir. Eq. 215.

(*l*) *Huguenin v. Basley*, 14 Ves.

273, 286; *Dent v. Bennett*, 4 M. &

C. 269; *Cooke v. Lamotte*, 15 Beav.

234; *Billage v. Southee*, 9 Ha. 534,

540; *Williams v. Bayley*, L. R. 1

Court will not, as it does where a fiduciary relation subsists, presume confidence put and influence exerted: the confidence and the influence must in such cases be proved extrinsically, but when they are proved extrinsically the rules of equity are just as applicable in the one case as in the other (*m*).

No general rule can be laid down as to what shall constitute undue influence. The question is one which must in each case depend on its own particular circumstances. There is no head of equity more difficult of application than the avoidance of a transaction on the ground of advantage taken of distress (*n*). The case presents no difficulty where direct restraint, duress, or oppression can be shown (*o*). The difficulty arises when the Court has to determine whether the advantage taken of distress amounts to oppression (*p*), or the influence exerted has been so pressing as to be undue within the rule of equity (*q*). In a case where the holders of forged bills working on the fears of a father for the safety of his son, who had forged them,

App. Ca. 200; *Smith v. Kay*, 7 H. L. 750, 779, *per* Lord Kingsdown; *Wyse v. Lambert*, 16 Ir. Ch. 379; *Rhodes v. Bate*, 1 Ch. 252.

(*m*) 7 H. L. 779, *per* Lord Kingsdown. See *Casborne v. Barsham*, 2 Beav. 76; *Boyse v. Russborough*, 3 Jur. N. S. 373; *Beanland v. Bradley*, 2 Sm. & G. 339; *Harrison v. Guest*, 6 D. M. & G. 424; *Rhodes v. Bate*, 1 Ch. 252; *Lyon v. Home*, 6 Eq. 655.

(*n*) *Ramsbottom v. Parker*, 6 Madd. 6.

(*o*) *Nicholls v. Nicholls*, 1 Atk. 409; *Roy v. Duke of Beaufort*, 2 Atk. 190; *Thornhill v. Evans*, *ib.* 330; *Talleyrand v. Boulanger*, 3 Ves. 448; *Lamplugh v. Lamplugh*, 1 Dick. 411; *Gubbins v. Creed*, 2 Sch. & Lef. 214; *Underhill v. Harwood*, 10 Ves. 219; *Pickett v. Logan*, 14 Ves. 215; *Peel v. —*, 16 Ves. 157; *Middleton v. Middleton*, 1 J. & W. 94; *Ellis v. Barker*, 19 W. R. 963.

(*p*) *Ramsbottom v. Parker*, 6

Madd. 6.

(*q*) *Middleton v. Sherburne*, 4 Y. & C. 389; *Boyse v. Russborough*, 3 Jur. N. S. 373; *Rhodes v. Bate*, 1 Ch. 252; *Armstrong v. Armstrong*, 1 R. 8 Eq. 1; *comp. Richards v. French*, 18 W. R. 636. The civil law always sets aside a contract procured by force, or from a want of liberty in the contracting party. It was said in the Pandects that the party must be intimidated by the apprehension of some serious evil of a present or pressing nature, and such as is capable of making an impression upon a person of courage. Pothier, however, thinks this rule too strict, and that regard should be had to the age, sex, and condition of the party, and that a fear which would not be deemed sufficient to have influence on a man in the prime of life, might be sufficient in respect of a woman, or a man in the decline of life. *Old. p. 1, c. 1, art. 3, s. 2, p. 25.*

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but without any distinct threat, and without any distinct promise not to prosecute, obtained from him a security for the amount of the bills, the transaction was set aside (r). In a case however where a debtor who was under arrest had given to a creditor, at whose suit he was imprisoned, a warrant of attorney to confess judgment for the whole amount claimed, the Court held that the arrangement having been entered into deliberately, with full knowledge of the circumstances, and with professional advice, was not impeachable, although one of the debts for which the warrant of attorney was given was barred by the Statute of Limitations (s). The Court is bound to examine carefully into a contract entered into with a party who is in gaol, and to see that no undue advantage has been taken of his position. But it is not true, as a general principle, that a man in insolvent circumstances and in prison cannot sell his property (t).

Inadequacy of consideration.

Mere inadequacy of consideration or inequality in a bargain is not a ground to set aside a transaction, if the parties were on equal terms and in a situation to judge for themselves, and performed the act wittingly and willingly (u). Mere inadequacy of consideration is not a ground for refusing specific performance of an unexecuted contract, and still less can it be ground for rescinding an executed contract (x). But inadequacy of consideration, if it be of so gross a nature as to

(r) *Williams v. Bayley*, 1 E. & I. App. Ca. 200. See *Nicholls v. Nicholls*, 1 Atk. 409; *Davies v. London & Provincial Marine Insurance Co.*, 8 Ch. D. 474.

(s) *Richards v. Carlisle*, 3 Eq. Rep. 278. See *Hinton v. Hinton*, 2 Ves. 634; *Roy v. Duke of Beaufort*, 2 Atk. 193; *Knight v. Marjoribanks*, 11 Beav. 322, 2 Mac. & G. 10; *Scott v. Scott*, 11 Ir. Eq. 74; comp. *Falkner v. O'Brien*, 2 Ba. & Be. 220; *Wilkinson v. Stafford*, 1 Ves. Jr. 43.

(t) *Brinkley v. Hann*, 1 Dru. 175. See *Parker v. Clarke*, 30 Beav. 54.

(u) *Gurtside v. Isherwood*, 1 Bro. C. C. 559; *Griffith v. Spratley*, 1

Cox, 383; *Collier v. Brown*, ib. 428; *Fox v. Macreth*, 2 Cox, 322; *Murray v. Palmer*, 2 Sch. & Lef. 488; *Copis v. Middleton*, 2 Madd. 409; *Wood v. Abrey*, 3 Madd. 417; *Meredith v. Saunders*, 2 Dow, 514; *Curzon v. Belworthy*, 3 H. L. 742; *Harrison v. Guest*, 6 D. M. & G. 434, 8 H. L. 481.

(x) *Collier v. Brown*, 1 Cox, 428; *Coles v. Trecothick*, 9 Ves. 246; *Callaghan v. Callaghan*, 8 Cl. & Fin. 401; *Bower v. Cooper*, 2 Ha. 408; *Borell v. Dunn*, ib. 450, per Wigram, V.-C.; *Abbott v. Swoode*, 4 Deg. & Sm. 456; comp. *Barnardiston v. Lingood*, 2 Atk. 134; *Falcke v. Gray*, 4 Drew. 651.

amount in itself to conclusive and decisive evidence of fraud, is a ground for cancelling a transaction. In such cases the relief is granted, not on the ground of the inadequacy of consideration, but on the ground of fraud as evidenced thereby (*y*). In determining whether the consideration is or is not adequate, it must always be remembered that there are fancy prices not regulated by intrinsic value (*z*).

By the civil law a sale for one half the value might be set aside for inadequacy (*a*). If the price given was less than one-half the value, the inequality was deemed by the civil law *læsio* and relief was afforded. There is however no rule in our own law as to what difference between the real value of property and the consideration given constitutes inadequacy of price. This the judge must decide (*b*). In most cases, however, perhaps a sale at half price might be sufficient to induce the Court to set aside a transaction, if there is no ground for suggesting that bounty was intended (*c*). When bounty is intended, there is no room for the inference of fraud from the inadequacy of the price; love and affection will alone support the conveyance without any pecuniary consideration, and will equally support it where there is a pecuniary consideration wholly inadequate to the value of the property (*d*).

The fact that a transaction may have been improvident or precipitate, or may have been entered into without independent

(*y*) *Gwynne v. Heaton*, 1 Bro. C. C. 9; *Gartside v. Isherwood*, ib. 559; *Heathcoate v. Paignon*, 2 Bro. C. C. 173; *Evans v. Llewellyn*, 1 Cox, 333; *Gibson v. Jeyes*, 6 Ves. 266, 273; *Underhill v. Horwood*, 10 Ves. 209, 219; *Morse v. Royal*, 12 Ves. 373; *Wood v. Abrey*, 3 Madd. 417; *Blake-ney v. Baggott*, 1 Dow. & Cl. 405; *Stillwell v. Wilkins*, Jac. 282; *Borell v. Dann*, 2 Ha. 440, 450; *Rice v. Gordon*, 11 Beav. 265; *Cockell v. Taylor*, 15 Beav. 103, 115; *Falcke v. Gray*, 4 Drew. 651; *Summers v. Griffiths*, 35 Beav. 27; *Butler v. Miller*, L. R. 1 Ir. Eq. 210; *Pres*

v. Coke, 6 Ch. 648; *Haggarth v. Wearing*, 12 Eq. 326.

(*z*) *Abbott v. Swarder*, 4 Deg. & Sm. 456.

(*a*) *Nott v. Hill*, 2 Ch. Ca. 120, *per* Lord Nottingham; *How v. Weldon*, 2 Ves. 516; *Day v. Newman*, 2 Cox, 80; *Burrows v. Lock*, 10 Ves. 474, *per* Sir W. Grant.

(*b*) See *Nott v. Hill*, 2 Ch. Ca. 120; *Butler v. Miller*, L. R. 1 Ir. Eq. 194; but see 2 Madd. 421 n.

(*c*) *Butler v. Miller*, L. R. 1 Ir. Eq. 194.

(*d*) *Whalley v. Whalley*, 1 Mer. 446.

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professional advice, is as immaterial as mere inadequacy of consideration, if the parties were on equal terms and in a situation to act and judge for themselves, and fully understood the nature of the transaction, and no evidence can be adduced of the exercise of undue influence or oppression (*e*). But inadequacy of consideration or the absence of independent professional advice becomes a most material circumstance where one of the parties to a transaction is from age, ignorance, distress, incapacity, recklessness, weakness of mind, body, or disposition, or from humble position or other circumstances, unable to protect himself. In all such cases, whatever be the nature of the transaction, the *onus* of proof rests on the party who seeks to uphold it to show that the other performed the act or entered into the transaction voluntarily and deliberately, knowing its nature and effect, and that his consent to perform the act or become a party to the transaction was not obtained by reason of any undue advantage taken of his position or of any undue influence exerted over him (*f*).

In *Clark v. Malpas* (*g*), “the seller,” said Lord Justice Knight Bruce, “was a man in humble life, imperfectly educated, and unable of himself to judge of the precautions to be taken in selling or of the mode of sale, or of the mode of securing the price which was not at once paid down. He was helpless in the matter, without advice, without protection. Now in the transactions only one solicitor was employed, and though the evidence may be conflicting, I am perfectly satisfied, without

(*e*) *Meredith v. Saunders*, 2 Dow. 514; *Blackie v. Clark*, 15 Beav. 595; *Harrison v. Guest*, 6 D. M. & G. 434, 8 H. L. 481; *Denton v. Donner*, 23 Beav. 291; *Toker v. Toker*, 3 D. J. & S. 487.

(*f*) *Murray v. Palmer*, 2 Sch. & Lef. 486; *Morse v. Royal*, 12 Ves. 373; *Pickett v. Loggan*, 14 Ves. 231; *Falkner v. O'Brien*, 2 Ba. & Be. 220; *Griffith v. Robbins*, 3 Madd. 191; *Wood v. Abrey*, ib. 417; *Willan v. Willan*, 2 Dow. 274; *Collins v. Hare*, 2 Bligh, N. S. 106; *M'Diarmid*

mid v. M'Diarmid, 3 Bligh, N. S. 374; *Bowen v. Kirwan*, Ll. & G. 47; *Dent v. Bennett*, 4 M. & C. 273; *Ahearne v. Hogan*, Dru. 310; *Gibson v. Russell*, 2 Y. & C. C. C. 104; *Cockell v. Taylor*, 15 Beav. 115; *Cooke v. Lamotte*, ib. 234; *Grosvenor v. Sherratt*, 28 Beav. 659; *Smith v. Kay*, 7 H. L. 750; *Prideaux v. Lonsdale*, 1 D. J. & G. 433; *Summers v. Griffith*, 35 Beav. 27; *Rhodes v. Bate*, 1 Ch. 252; *Tate v. Williamson*, 2 Ch. 65; *Prees v. Coke*, 6 Ch. 648.

(*g*) 4 D. F. & J. 403.

meaning any reflections on Mr. Cooper, that if Mr. Cooper was not the solicitor of the purchaser alone in the matter, he was more the solicitor of the purchaser than of the seller. The bargain was not an ordinary one; it was to sell these cottages, forming the whole of the seller's property, in consideration of a weekly annuity for his life and a dwelling to be provided for him, and a sum of 100*l.* to be paid after his death, with power to him to require 10*l.* of it to be paid in his lifetime. The seller was made to convey absolutely at once without taking any security for the annuity, for the dwelling-house, or for the 100*l.* A title was not shown, perhaps a marketable title could not be shown nor any title without expense, but that did not justify making the seller enter into absolute covenants for title which on conviction would render him liable to repay the whole purchase-money. For the annuity he had only the personal liability of the purchaser, probably a substantial person, but who might die at any moment or fall into adverse circumstances. He might sell the property and then fail or die, and from what source then was the annuity to come. The same observations apply to the 10*l.* and the 100*l.* So that not only was there completion at an undervalue, which alone might be nothing, but there was completion under circumstances of gross imprudence, on terms on which the seller ought not to have been allowed to complete. It does not appear that Cooper called attention to any of these considerations. No counterpart or copy of the conveyance was kept for the seller: he was left helpless. If he had been bred to the law, if he had had the advantages of education, the case might have stood differently."

So also in *Baker v. Monk (h)*, certain real estates had been sold by an elderly, uneducated woman in humble life to a person far above her in station. The agreement was made without the intervention of anyone acting on her behalf, and it appearing that the consideration paid was inadequate, the sale was set aside, though there was no evidence of fraud on the part of the purchaser. "Here," said Lord Justice Turner (*i*), "is a transaction between an old woman, said to be a very shrewd old

(h) 4 D. J. & S. 388.

(i) *Ib.* 393.

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woman, but still an old woman, dealing with a person far superior to her in position, there being no advice given to her and no assistance rendered to her in the course of the treaty for the purchase and agreement for the sale of the fee simple of the property for an annuity of 9s. a-week, to last during the life of this old lady, who could know no more about what the pecuniary value of that annuity was than any person whom you might meet walking along the streets at the time. I think there was that distinction between the parties which rendered it incumbent on the appellant to throw further protection around this lady before he made the bargain with her."

The mere fact however that one of the parties may be an illiterate person or a man of advanced age, or may be in bad health, or in distress, or pecuniary embarrassment, will not vitiate a transaction, even although it may have been founded on an inadequate consideration and no independent advice may have been had, if it appear on the face of the evidence that he was fully competent to form an independent judgment in the matter and became a party to the transaction deliberately and advisedly, knowing its nature and effect. The *onus* rests on the party impeaching the transaction to show that coercion was used or undue influence was exercised (*k*). There can be no title to relief on the ground of advantage taken of distress where the advantage or disadvantage of the transaction is to be the result of future contingencies and is not within the view of the parties at the time (*l*).

False statement
of consideration.

A mere false statement of the consideration does not of itself necessarily vitiate a deed (*m*), but there may be cases where a false statement of the consideration may of itself

(*k*) *Lewis v. Pead*, 1 Ves. Jr. 19; 2 Sch. & Lef. 607, 639; *Price v. McNeill v. Cahill*, 2 Bligh, 228; *Price*, 1 D. M. & G. 308. But see *Pratt v. Barker*, 1 Sim. 1; *Hunter v. Cooke v. Lamotte*, 15 Beav. 234; *Atkins*, 3 M. & K. 113; *Purdie v. comp. Murray v. Palmer*, 2 Sch. & Millett, Taml. 31; *Richards v. Cur- Lef. 486.*
lewis, 3 L. & Eq. Rep. 278; *Curzon v.*

(*l*) *Ramsbottom v. Parker*, 6 Madd. 6.

(*m*) *Bowen v. Kirwan*, Ll. & G. 47.
Belworthy, 3 H. L. 742; *Harrison v.*
Guest, 6 D. M. & G. 434, 8 H. L.
481. See *Hovenden v. Lord Annesley*,

destroy the whole transaction (*n*). The general rule is that, where no consideration is expressed in a deed, a party may aver and prove consideration in support of it, and, where a consideration is expressed, a man may still aver other considerations not inconsistent therewith (*o*). Where, however, the consideration expressed in a deed is impeached on the ground of fraud, the party claiming under the deed cannot aver in its support considerations different from that expressed (*p*). If the transaction on which a deed purports to be founded and the consideration for which it was executed appear to be untruly stated, the instrument may, if the untruth would operate fraudulently, lose all its binding quality in equity even though it be conclusive at law (*q*). If a deed states on its face a pecuniary consideration, a party cannot, if it be impeached, set up considerations of blood or natural love and affection (*r*). Where, however, the recitals stated a pecuniary consideration as the foundation of a deed, and in the operative part love and affection were introduced as being partly the consideration on which the deed was founded, the court would not from this circumstance alone presume fraud (*s*).

In dealings between parties one of whom is subject to the influence of the other, there must be upon the face of the deed itself a fair and correct statement of the transaction. If the statement as to the consideration is not true, the transaction cannot be supported. A consideration partly of the consideration stated in the deed and partly of something else is not consistent with the consideration stated on the face of the deed. It is not open to the party who seeks to uphold it to give such evidence to sustain the deed (*t*).

(*n*) *Ib.*; *Uppington v. Bullen*, 2 Ves. 627; *Watt v. Grove*, 2 Sch. & Dr. & War. 184; *Gibson v. Russell*, 2 Lef. 501; *Willan v. Willan*, 2 Dow. Y. & C. C. C. 104; *Slator v. Nolan*, 274. I. R. 11 Eq. 395.

(*o*) *Hartopp v. Hartopp*, 17 Ves. 501. (*q*) *Watt v. Grove*, 2 Sch. & Lef. 192; *Clifford v. Turrell*, 1 Y. & C. C. C. 138, affd. 14 L. J. Ch. 39; (*r*) *Clarkson v. Hanway*, 2 P. Wms. 203; *Willan v. Willan*, 2 *Nixon v. Hamilton*, 2 Dr. & Wal. Dow. 282. 387, and cases cit. 2 P. Wms. 204.

(*p*) *Clarkson v. Hanway*, 2 P. Wms. 203; *Bridgman v. Green*, 2 (*s*) *Filmer v. Gott*, 4 Bro. P. C. 230; *Whalley v. Whalley*, 3 Bligh, 13. (*t*) *Aherne v. Hogan*, Dru. 310;

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The statement of consideration where there was in fact none, or the untrue statement of the consideration or other circumstances of a suspicious nature, may be sufficient to shift the burthen of proof from the party impeaching a deed upon the party upholding it (*u*).

Cases in which transactions have been set aside for undue influence.

The jurisdiction of the court in relieving against transactions on the ground of undue influence has been exercised as between a medical man and a patient (*x*); as between the keeper of a lunatic asylum and a patient under his care (*y*); as between a minister of religion and a person under his spiritual influence (*z*); as between a man and a woman over whom he has obtained spiritual ascendancy by working upon her superstitious fancies and delusions (*a*); as between an old lady and a spiritualist medium (*aa*); as between a young man in the army just come of age and his superior officer (*b*); as between husband and wife (*c*); as between a man and a lady to whom he was about to be married (*d*); as between a man and a woman with whom he was living (*e*); as between brother and sister (*f*); as between two brothers (*g*); as between an

Uppington v. Bullen, 2 Dr. & War. 184; *Clifford v. Turrell*, 1 Y. & C. C. C. 138; *Gibson v. Russell*, 2 Y. & C. C. C. 104; *Slator v. Nolum*, 1 I. R. 11 Eq. 395.

(*u*) *Watt v. Grove*, 2 Sch. & Lef. 492, 502; *Griffiths v. Robbins*, 3 Madd. 191; *Gibson v. Russell*, 2 Y. & C. C. C. 104; *Aherne v. Hogan*, Dru. 310. See *Harrison v. Guest*, 6 D. M. & G. 434, 8 H. L. 481.

(*x*) *Dent v. Bennett*, 4 M. & C. 269; *Aherne v. Hogan*, Dru. 310; *Gibson v. Russell*, 2 Y. & C. C. C. 104; *Allen v. Davis*, 4 Deg. & Sm. 133; *Billage v. Southee*, 9 Ha. 540; *Mitchell v. Homfray*, 8 Q. B. D. 587; comp. *Holmes v. Howes*, 20 W. R. 310.

(*y*) *Wright v. Proul*, 13 Ves. 136.

(*z*) *Norton v. Kelly*, 2 Eden, 216;

Haguenin v. Basley, 14 Ves. 273;

Middleton v. Sherburne, 4 Y. & C.

358; *Whyte v. Meade*, 2 Ir. Eq. 420. Comp. *Kirwan v. Cullen*, 4 Ir. Ch. 322; *Re Metcalfe*, 2 D. J. & S. 122. See also *Thompson v. Hefferman*, 4 Dr. & War. 286.

(*a*) *Nottidge v. Prince*, 2 Giff. 246.

(*aa*) *Lyon v. Home*, 6 Eq. 655.

(*b*) *Lloyd v. Clarke*, 6 Beav. 309.

(*c*) *Lambert v. Lambert*, 2 Bro. P. C. 18; *Peel v. —*, 16 Ves. 157; *Prie v. Price*, 1 D. M. & G. 308; *Proctor v. Robinson*, 35 Beav. 335. See *Nedby v. Nedby*, 5 Deg. & S. 377; *Coulson v. Allison*, 2 D. F. & J. 521.

(*d*) *Page v. Horne*, 11 Beav. 227, 235; *Cobbett v. Brock*, 20 Beav. 525.

(*e*) *Coulson v. Allison*, 2 D. F. & J. 521. See *Farmer v. Farmer*, 1 H. L. 724; *Garvey v. M'Minn*, 9 Ir. Eq. 526.

(*f*) *Sharp v. Leach*, 31 Beav. 491.

(*g*) *Sturge v. Sturge*, 12 Beav. 229.

elder and a younger brother just come of age (*h*); as between two sisters (*i*); as between an uncle and his nephew (*k*), who was deaf and dumb (*l*); as between an uncle, who was in such a state of bodily and mental imbecility as rendered him incapable of transacting business requiring deliberation and reflection, and a nephew (*n*); as between nephew and aunt (*n*), or aunt and niece (*o*); as between a young man just come of age and a man who had acquired an influence over him during his minority (*p*); as between a young man of intemperate habits and a person with whom he was living (*q*); as between an unmarried woman and her brother-in-law (*r*); as between an old lady and a woman living with her in the capacity of a companion or domestic (*s*); as between a child and an imbecile parent (*t*); and in other cases (*u*).

The principle on which the court sets aside transactions on the ground of undue influence only applies to cases where some

(*h*) *Sercombe v. Saunders*, 34 Beav. 382.

(*i*) *Harvey v. Mount*, 8 Beav. 439.

(*k*) *Tate v. Williamson*, 2 Ch. 55.

(*l*) *Ferres v. Ferres*, 2 Eq. Ca. Ab. 695. Comp. *Farmer v. Farmer*, 1 H. L. 724; *Vickers v. Bell*, 9 L. T. N. S. 600.

(*n*) *Willan v. Willan*, 2 Dow. 274.

(*n*) *Griffiths v. Robbins*, 3 Madd. 191; *Cooke v. Lamotte*, 15 Beav. 241. See *Toker v. Toker*, 3 D. J. & S. 487.

(*o*) *Anderson v. Ellsworth*, 3 Giff. 154.

(*p*) *Grosvenor v. Sherratt*, 28 Beav. 661; *Smith v. Kay*, 7 H. L. 750; *Slutor v. Nolan*, 1 R. 11 Eq. 386.

(*q*) *Terry v. Wacher*, 15 Sim. 447.

(*r*) *Rhodes v. Bate*, 1 Ch. 252; *Coutts v. Acworth*, 8 Eq. 558; *Wollaston v. Tribe*, 9 Eq. 44. Comp. *Richards v. French*, 18 W. R. 636.

(*s*) *Cole v. Gibson*, 1 Ves. 503; *Bate v. Bank of England*, 9 Jur. 545.

(*t*) *Whelan v. Whelan*, 3 Cow. (Amer.), 538. See *Gardner v. Gardner*, 22 Wend. (Amer.). Comp. *Beanland v. Bradley*, 2 Sm. & G. 339.

(*u*) *Brooke v. Gally*, 2 Atk. 34; *Bell v. Howard*, 9 Mod. 302; *Osmond v. Fitzroy*, 3 P. W. 129; *How v. Weldon*, 2 Ves. 516; *Evans v. Llewellyn*, 1 Cox, 333; *Wood v. Abrey*, 3 Madd. 417; *Hudson v. Beauchamp*, cit. 3 Bligh, 18; *Collins v. Hare*, 2 Bligh, N. S. 106; *McDiarmid v. McDiarmid*, 3 Bligh, N. S. 374; *Aylward v. Kearney*, 2 B. & B. 477; *D'Arcy v. D'Arcy*, Hay. & J. 115; *Longmate v. Ledger*, 2 Giff. 157; *Custance v. Cuninghame*, 13 Beav. 363; *Douglas v. Culverwell*, 4 D. F. & J. 20; *Prideaux v. Lonsdale*, 1 D. J. & S. 439; *Williams v. Bayley*, 1 E. & L. App. Ca. 205; *Davies v. London & Provincial Marine Insurance Co.*, 8 Ch. D. 474.

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lawful relation has been constituted between the parties (*x*). Where, accordingly, a woman while living in adultery with a married man assigned certain property to secure a debt which he owed, the court would not, from the mere existence of the relation, presume undue influence, the woman being of mature intelligence, and the transaction having been entered into deliberately (*y*).

Transactions even between mortgagor and mortgagee are looked on with jealousy where a mortgagor in embarrassed circumstances, and under pressure, sells the equity of redemption to the mortgagee for less than others would have given, and there is evidence to show misconduct on the part of the mortgagee in obtaining the purchase (*z*). However, when mortgaged premises are to be sold under orders in bankruptcy against the mortgagor, the mortgagee may, by application to the court, obtain permission to become purchaser, if he prove to be the highest bidder at the sale (*a*). If the mortgagee of leasehold premises obtain a renewal either by being in possession or by clandestine conduct towards the mortgagor, the renewal lease will be treated as a graft upon the old one; and the mortgagee will not be allowed to retain it for his own benefit, but will hold it in trust (*b*).

In the application of the principles of the court, there is no distinction between the case of one who himself exercises a direct influence, or of another who makes himself a party with the person who exercises the undue influence (*c*).

Whether a transaction can be set aside on the ground of undue influence, where the influence has been exercised, not by the party obtaining the benefit, but by a third person, appears to be doubtful (*d*).

(*x*) *Hargreave v. Eccard*, 6 Ir. Ch. 278.

(*y*) *Ib.*

(*z*) *Gubbins v. Creed*, 2 Sch. & Lef. 221; *Ford v. Olden*, 3 Eq. 461.

(*a*) *Ex parte Ducour*, Buck, 18; *Ex parte Hammond*, *ib.* 465.

(*b*) *Nesbitt v. Fredennick*, 1 Ba. &

Be. 46.

(*c*) *Ardylasse v. Pitt*, 1 Vern. 238; *Espy v. Lake*, 10 Ha. 260; *Wyse v. Lambert*, 16 Ir. Ch. 379, *supra*, pp. 126, 158.

(*d*) *Bentley v. Mackay*, 31 Beav. 143. See *Wycherley v. Wycherley*, 2 Eden. 175.

The Court of Chancery assumed jurisdiction at a very early Chap. III. —
 period to set aside transactions in which expectant heirs had Expectant heirs.
 dealt with their expectations, when the court was satisfied that they had not been adequately protected against the pressure put on them by their poverty. The early cases may be found collected in a note to *Davis v. Duke of Marlborough* (e), in which note a full account is given of the case of *Berny v. Pitt* (f), before Lord Nottingham. A strong instance of the length to which the doctrine of inadequacy of protection was carried may be found in *Wiseman v. Beake* (g), where the plaintiff, an expectant heir, was nearly forty years old, and was a proctor. There was at first considerable doubt upon this jurisdiction, as is shown by Lord Keeper Guildford having in *Nott v. Hill* (h) reversed a decree of Lord Nottingham, which decree of reversal was itself reversed by Lord Chancellor Jeffreys. Lord Guildford, in giving judgment, says:—"If it is to be decreed a law in Chancery that no man must deal with an heir in his father's lifetime, that were something." He was obviously dissatisfied with the doctrine; nevertheless the doctrine was established, and from that time it has finally been settled that mere inadequacy of price would entitle an expectant heir to set aside on terms the sale of a reversion, and the purchaser was bound to establish the fact that the transaction was fair and the consideration given was sufficient. This doctrine at first was applied to all cases of expectancy on the death of parents, and was afterwards extended to the sale of any reversion.

But the arbitrary rule of the Court of Chancery, according to which the sale of a reversion was liable to be set aside simply on the ground that the sum paid was not, in the opinion of the Judge, an adequate value, being found to be an impediment to fair and reasonable as well as to unconscionable bargains, the Sales of Reversions Act, 31 & 32 Vict. c. 4, was passed, which enacts that no purchase made *bonâ fide* and without fraud or unfair dealing of any reversionary

(e) 2 Sw. 139n.

(g) 2 Vern. 121.

(f) 2 Vern. 14.

(h) 1 Vern. 167.

interest in real or personal estate shall be hereafter opened or set aside merely on the ground of undervalue.

The Act is carefully limited to purchases made *bond fide* and without fraud or unfair dealing, and leaves undervalue still a material element in cases in which it is not the sole equitable ground of relief. In a case accordingly where the party entitled to a reversionary interest was very poor, and there was a false recital in the deed that more money had been advanced than was actually paid, the deed was only allowed to stand for the money actually advanced (*i*).

But the protection which the court throws round expectant heirs and unwary young men in the hands of unscrupulous persons has not been affected by the repeal of the usury laws or by the change of the law as to the sale of reversionary interests (*k*).

These changes in the law have in no degree altered the *onus probandi* where the relative position of the parties is such as, according to the language of Lord Hardwicke in *Chesterfield v. Jansen*, 2 Ves. 125, to raise from the circumstances the presumption of fraud. Mere inadequacy of price will entitle an expectant heir to apply to the court to set aside on terms the sale of a reversionary interest, and the *onus* of proving the transaction fair and the price sufficient is on the purchaser (*l*). Where accordingly a money lender advanced monies to a young man entitled to a large reversionary interest in the event of his surviving his father, taking by way of security his acceptances at three months for the sums advanced with interest and discount together exceeding 60 per cent., and the young man had no professional assistance, and no application was made to his father or to the solicitor of his father, an order was made for the delivery up of the bills on payment of the sums actually advanced and interest at five per cent. (*m*).

In each case it must depend on the circumstances whether

(*i*) *Re Slater's Trust*, 11 Ch. D. 238.

(*k*) *Tyler v. Yates*, 6 Ch. 665 ;
Lord Aylesford v. Morris, 8 Ch. 484 ;
Beynon v. Cooke, 10 Ch. 389.

(*l*) *Lord Aylesford v. Morris*, 8 Ch. 490 ; *O'Rorke v. Bolingbroke*, 2 App. Ca. 814.

(*m*) *Lord Aylesford v. Morris*, 8 Ch. 484.

the presumption of fraud is raised. In a case accordingly where a man purchased the reversionary interest from a lad only a few days above 21 years, in furtherance of an arrangement made whilst he was an infant, the transaction was held good, as upon the evidence it appeared to be not only *bonâ fide* and without fraud or unfair dealing, but a fair one and to be for the advantage of the lad, and was sanctioned by his father, who was his natural guardian. The fact that the price given for the reversion was inadequate, as the facts turned out in the end, was considered immaterial, there being evidence to show that the purchaser was not aware that the life of the father was not a good one, and that he was not ignorant of the fact because he had neglected to make proper inquiries or to take steps which he ought to have taken. Nor was the fact that the lad had no professional adviser considered under the circumstances material, as it appeared that he had no friend whom he could consult but his father, and that neither he nor his father had the means of paying a professional adviser. The court was, however, of opinion that had the matter been practicable, and the lad not been penniless, the purchaser should have required him to have had an independent adviser (*n*).

A sale of a reversionary interest by a young man of full age for a substantial purpose stands on the same footing as other contracts (*o*).

The principle on which a Court of Equity relieves from an unconscionable bargain entered into with an expectant heir or reversioner for the loan of money applies also to the case of money being lent on unconscionable terms (not fully understood by the borrower and known not to be fully understood by the lender) to a young man, being a minor at the time of the first transaction, the son of a father possessing large property, who has no property of his own and no expectation of any, except such general expectations as are founded on his father's position in life, the money being lent without any thought of repayment by the borrower but on the credit of

(*n*) *O'Rourke v. Bolingbroke*, 2 App. Ca. 814.

(*o*) *Judd v. Green*, 45 L. J. Ch. 108.

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such general expectations, and in the hope of extorting payment from the father to avoid the exposure attendant on his son being made a bankrupt (*p*).

The abolition of the usury laws does not affect the power of the court to set aside usurious transactions when they are founded on fraud. Accordingly a series of deeds charging sums advanced by a money-lender with exorbitant interest on the borrower's estates, which were ample security, were set aside save to the extent of securing the actual advances with moderate interest, the deeds containing unprecedented clauses, such as authorising a sale without notice and empowering the lender to pay off existing charges (which bore interest at six per cent.) and to charge twenty per cent. thereon, and other clauses of a similar character, the court being of opinion that the clauses were introduced by the fraud and device of the money-lender without the knowledge of the borrower, who was unprotected by proper professional advice (*q*).

Voluntary settlements and deeds of gift.

Considerations of a similar character apply to the case of deeds of gift and voluntary settlements. A man may make a voluntary settlement if he pleases, either by way of gift or in the shape of a trust to be executed by persons to whom he conveys property. Whether it be a gift or a conveyance upon trust, it must satisfactorily appear that he understood and approved of the contents of the deed, and knew what he was doing, or at all events was protected by independent advice, and that no undue influence was exercised over him by the person in whose favour he made the instrument (*r*). No general rule can be laid down as to the proper and usual provisions in such a settlement, but a power of revocation is not essential. Whether there should be such a power or not must depend on the circumstances of the case (*s*).

The absence of a power of revocation in a voluntary settlement, and the fact that the attention of the settlor was not

(*p*) *Nevill v. Snelling*, 15 Ch. D. 679.

(*q*) *Howley v. Cook*, 1. R. 8 Eq. 571. See *Wyatt v. Cook*, 16 W. R. 502.

(*r*) *Lister v. Hodgson*, 4 Eq. 32; *Philippis v. Mullings*, 7 Ch. 246; *Turner v. Collins*, ib. 329.

(*s*) *Philippis v. Mullings*, 7 Ch. 246.

called to that absence, do not make a voluntary settlement invalid. They are merely circumstances to be considered in deciding on the validity of the settlement. The true rule is that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the other circumstances of each case (*t*). The absence of a power of revocation in a voluntary deed not impeached on the ground of undue influence is material when it appears that the settlor did not intend to make an irrevocable settlement, or when the settlement is of such a nature or was made under such circumstances as to be unreasonable and improvident, unless guarded by a power of revocation (*u*). If there are substantial questions of incapacity and undue influence *bonâ fide* raised, and the Judge is unable to arrive at a favourable conclusion upon them, he cannot thereupon proceed to treat the absence of a power of revocation upon its own merits, as if those other questions had not been raised at all. Without it the grounds of special impeachment might be insufficient. Without these it might itself be insufficient. Yet the two in combination might be fatal to the deed (*x*).

In *Philipps v. Mullings* (*y*), where it was the object of the settlor to preserve his property from being wasted by himself, and in *Proctor v. Gregg* (*z*), where it was the object of the settlor to protect himself against the importunity of his relations, it was held that the absence of a power of revocation was sufficiently accounted for and the deed was upheld. So also in *Long v. Donegan* (*a*), where it appeared that the settlor had a strong dislike and fear of some of his relations, and wished to cut them off from his inheritance, the deed was upheld though it contained no power of revocation.

In *Henshall v. Fereday* (*b*), however, where a lady on the suggestion of her brother executed a deed which had been prepared by a solicitor on his instructions, and the solicitor

(<i>t</i>) <i>Hall v. Hall</i> , 8 Ch. 430 ; <i>Henry</i>	8 Eq. 45.
<i>v. Armstrong</i> , 18 Ch. D. 668.	(<i>y</i>) 7 Ch. 244.
(<i>u</i>) <i>Hall v. Hall</i> , 8 Ch. 440, <i>per</i>	(<i>z</i>) 21 W. R. 240 n.
Lord Selborne.	(<i>a</i>) 21 W. R. 830.
(<i>x</i>) <i>Armstrong v. Armstrong</i> , I. R.	(<i>b</i>) 21 W. R. 570.

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never saw the settlor or performed any duty at all towards her, the deed was set aside on the ground that it contained no power of revocation. Where a lady understood what she was doing, and that it was a final and irrevocable settlement of her property, and the settlement was reasonable and just, it was upheld, though the deed did not exactly correspond with the instructions, but was read over to and executed by her. The fact that she may have afterwards burned the deed and expressed her satisfaction that she had got rid of it is of no weight. This fact may prove change of mind but does not prove that at the time of the execution of the deed her mind was other than therein expressed (*c*).

Voluntary limitations in a settlement come under the general rule as to undue influence in obtaining the gift (*d*). But if there is no ground for impeaching the settlement, either on the ground of undue influence or on the ground of the absence of a power of revocation, the provisions of a marriage settlement in favour of volunteers cannot be revoked (*e*).

(*c*) *Hall v. Hall*, 8 Ch. 437.

(*e*) *Paul v. Paul*, 20 Ch. D. 742.

(*d*) *Wollaston v. Tribe*, 9 Eq. 44.

CHAPTER IV.

FRAUD UPON THIRD PARTIES.

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ANOTHER class of frauds is where a contract or other act is substantially a fraud upon the rights, interests, or intentions of third parties. The general rule is that particular persons in contracts and other acts shall not only transact *bond fide* between themselves, but shall not transact *malâ fide* in respect to other persons who stand in such a relation to either as to be affected by the contract or the consequences of it (*a*). Collusion between two persons to the prejudice or loss of a third is in the eye of the Court the same as a fraud (*b*).

SECTION I.—FRAUD UPON CREDITORS.

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A class of frauds coming under the head of fraud upon third parties embraces all those agreements or other acts of parties which tend to delay, deceive, or defraud creditors.

Transactions in fraud of creditors are voidable at common law (*c*), but the legislature, with the view of affirming the rule and carrying the principles of the common law more fully into effect, declared by Statutes 50 Edw. 3, c. 6, and 3 Hen. 7, c. 4, all fraudulent gifts of goods and chattels in trust for the donor and to defraud creditors to be void.

The Statute 13 Eliz. c. 5, perpetuated by 29 Eliz. c. 5, after reciting that feoffments, gifts, grants, alienations, conveyances,

(*a*) 2 Ves. 156, 157, *per* Lord Hardwicke; *Wallis v. Duke of Portland*, 3 Ves. 502.

(*b*) *Garth v. Cotton*, 1 Dick. 217.

(*c*) *Cudogan v. Kennett*, Cowp. 432;

Copis v. Middleton, 2 Madd. 428; *Rickards v. Att.-Gen.*, 12 Cl. & Fin. 44; *Barton v. Van Heythuysen*, 11 Ha. 132.

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bonds, suits, judgments, and executions, have been contrived of malice, fraud, covin, collusion, &c., to delay, hinder, or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, &c., proceeds to declare and enact that every feoffment, &c., of lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution made for any intent and purpose, before declared and expressed, shall be, as against that person or persons, his or their heirs, successors, executors, &c., whose actions, suits, &c., are or might be in any wise disturbed, hindered, delayed, or defrauded, utterly void (*d*). Estates, however, or interests in lands or chattels, &c., conveyed or assured *bonâ fide* and on good consideration without notice to the person who is dealing with the person who afterwards becomes insolvent of any fraud or collusion, are excepted from the operation of the Statute (*e*).

As between the parties themselves and all persons claiming under them in privity of estate, voluntary conveyances are binding (*f*); but in so far as they have the effect of delaying, defrauding, or deceiving creditors, voluntary conveyances are not *bonâ fide*, and are void as against creditors to the extent to which it may be necessary to deal with the property to their satisfaction. To this extent and to this extent only, they will be treated as if they had not been made. To every other purpose they are good (*g*), unless the transaction is so tainted with fraud as to necessitate its avoidance *in toto* so as to work justice between the parties (*h*).

(*d*) *Tarleton v. Liddell*, 17 Q. B. 391.

(*e*) 13 Eliz. c. 5, s. 6. See *Tarleton v. Liddell*, 17 Q. B. 390; *Thompson v. Webster*, 7 Jur. N. S. 531, 4 Deg. & S. 538; *Alton v. Harrison*, 4 Ch. 622; *Golden v. Gillam*, 20 Ch. D. 392.

(*f*) *Petre v. Espinasse*, 2 M. & K. 496; *Robinson v. McDonnell*, 5 B. & Ald. 134; *French v. French*, 6 D. M. & G. 95; *Olliver v. King*, 8 D. M. & G. 110. A sham transfer for the

purpose of defrauding creditors will not pass the property in goods even as between the debtor and his confederate. *Bowes v. Foster*, 2 H. & N. 779.

(*g*) *Curtis v. Price*, 12 Ves. 103; *Worsley v. De Mattos*, 1 Burr. 474; *Croker v. Martin*, 1 Bligh, N. S. 573; *Bessey v. Windham*, 6 Q. B. 166; *French v. French*, 6 D. M. & G. 95; *Neale v. Day*, 28 L. J. Ch. 45.

(*h*) *Tarleton v. Liddell*, 17 Q. B. 418, 419.

The mere fact of a deed being voluntary is not enough to render it void as against creditors (*i*). But if at the time a man executes a voluntary settlement he is actually insolvent, the settlement is void as against creditors (*k*). It is not, however, necessary, in order to invalidate a voluntary settlement, that the settlor should be in a state of insolvency (*l*). The language of the Act being that any conveyance of property is void against creditors, if it is made to hinder, delay, or defeat creditors, the Court has to decide in each particular case, whether under all the circumstances, it can come to the conclusion that the object of the settlor was to hinder, delay, or defeat creditors (*m*). "I abstain," said Lord Campbell (*n*), "from saying what are the particular proofs that are necessary, or from laying down any particular rule as to what amount of evidence, or what proof of consideration or want of consideration, or what evidence of notice or want of notice may be necessary. Those are facts to be inquired into in each particular case." If there is no evidence to show that the settlor, when he executed the instrument, had any intention to defraud, it is immaterial that he may have been embarrassed at the time, and wanted money to meet claims upon him, if there is no reason for saying that he had the slightest notion of doing more than borrowing money to tide over the difficulty. Though there may be circumstances in the case which might lead to the presumption that the settlement was made to defeat creditors, yet when the circumstances come to be explained and established, it may be clear that no such intent existed in the minds of either of the parties to the transaction (*o*).

Although there be no intention to defraud, the question then is whether there is any evidence to show that the settlor knew at the time when the settlement was executed that it was a

(*i*) *Holmes v. Penney*, 3 K. & J. 99.

(*k*) *French v. French*, 6 D. M. & G. 101; *Freeman v. Pope*, 5 Ch. 544; *Taylor v. Coenen*, 1 Ch. D. 640.

(*l*) *Townsend v. Westacott*, 2 Beav. 344; *Thompson v. Webster*, 4 Drew. 632, 7 Jur. N. S. 531, in Dom. Proc.

(*m*) *Thompson v. Webster*, 4 Drew. 682, *per* Kindersley, V.-C., *ib.* 7 Jur. N. S. 531, *per* Lord Campbell in Dom. Proc.

(*n*) *Ib.*

(*o*) *Thompson v. Webster*, 7 Jur. N. S. 533, *per* Lord Chelmsford in Dom. Proc.

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necessary consequence of the settlement that his creditors would be defrauded (*p*), for in order to defeat a voluntary settlement it is not necessary that there should be proof of an actual and express intent to defeat creditors. It is enough if the facts are such as to show that the settlement would necessarily have that effect. If at the date of the settlement the person making the settlement was not in a position actually to pay creditors, the law will infer that he intended by making the voluntary settlement to defeat and delay them. Again, the same inference will be made by the law, if after deducting the property which is the subject of the settlement, sufficient assets are not left for the payment of the settlor's debts (*q*). The mere fact, however, that a debt exists which existed at the date of the settlement, will not make a deed fraudulent (*r*). But where the intention to defraud is manifest, and no other purpose appears, this is sufficient to bring the case within the statute and to override all circumstances whatever (*s*).

A man may by executing a settlement defeat, defraud, or delay his creditors although, at the time he makes the settlement, he may have more property than would be sufficient to satisfy his creditors, after the settlement has been made, because the property may be so inaccessible as to make it almost impossible for the creditors to get possession of it—it may be at the antipodes—it may be an accumulation of bad debts very difficult to get. There might be fifty reasons to bring it within the scope of the statute, so that a solvent man in making a settlement may nevertheless be liable to have that settlement avoided, although not only he was not insolvent but might have had more than enough property left in some form or other to satisfy his creditors (*t*).

The existence of debts at the time of the execution of the deed is not sufficient to debar a man from executing a volun-

(*p*) *Ib.*

(*q*) *Freeman v. Pope*, 5 Ch. 538 ;
Mackay v. Douglas, 14 Eq. 120 ;
Taylor v. Coenen, 1 Ch. D. 641 ;
Rüller v. Rüller, 22 Ch. D. 74. See
French v. French, 6 D. M. & G. 101.

(*r*) *Skarf v. Southy*, 1 Mac. & G.

364.

(*s*) *Acraman v. Corbett*, 1 J. & H. 423.

(*t*) *Thompson v. Webster*, 7 Jur. N. S. 532, *per* Lord Cranworth, in Dom. Proc.

tary deed. A man may intend to pay every debt as soon as it is contracted, and constantly use his best endeavours and have ample means to do so, and yet be frequently, if not always, indebted in small sums (*u*). In the absence of an intent to delay, defraud or defeat creditors, a voluntary settlement made by a settlor in embarrassed circumstances but having property not included in the settlement, ample for payment of debts, due by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may to a considerable amount remain unpaid (*x*).

It makes no difference whether the voluntary conveyance is to trustees or directly to volunteers: if the conveyance is made to trustees and all the *cestuis que trustent* are volunteers, the conveyance to the trustees is void under the Statute no less than the interests of the *cestuis que trustent* (*y*).

A surety is no more justified in placing his property out of the reach of liability for the debt than if he were the principal debtor (*z*). Nor is a man who has entered into a guarantee for the liability of another justified in making a voluntary settlement, if under the peculiar circumstances of the case the possible liability under the guarantee is likely at no distant date to become an actual debt. There may be a state of things in which the liability of a guarantor might be so remote that it need not be regarded, but if he conveys away all his property by a voluntary settlement, it is doubtful whether the settlement can in any case be supported in the event of his ultimately being called on under his guarantee (*a*). In a case, accordingly, where in 1872 a father gave a bank a guarantee to secure the balance due from his son on his banking account to the extent of £1000: and in May 1877 the son's account was overdrawn by £1500, and the father in May, 1877, made a voluntary settlement of a leasehold property worth £200 a year, his only other property being furniture worth less than £200 and a debt of £1500 due to him from his son, and in 1880 the son went into

(*u*) *Townsend v. Westacott*, 2 Beav. 344.

(*x*) *Kent v. Riley*, 14 Eq. 190.

(*y*) *Townend v. Toker*, 1 Ch. 458.

(*z*) *Goodricke v. Taylor*, 2 H. & M. 380, 2 D. J. & S. 135.

(*a*) *Ridler v. Ridler*, 22 Ch. D. 74.

liquidation ; it was held that the settlement was void as against creditors, for that under the circumstances the liability under the guarantee ought to have been regarded as a substantial one ; that the father had no right to treat the sum of £1500 due to him from the son as a good debt, and that after the settlement the father had nothing left to meet his liability under the guarantee (*b*).

The provisions of the stat. 13 Eliz. c. 5, are not confined to existing creditors, but extend to subsequent creditors, whose debts had not been contracted at the date of the settlement (*c*), but the principle will not operate in favour of subsequent creditors, unless it can be shown either that the settlor made the settlement with the express intent to "delay, hinder, or defraud" persons who might become creditors (*d*), or that after the settlement the settlor had not sufficient means or reasonable expectation of being able to pay his then existing debts (*e*), or at least that there are debts unsatisfied which were due at the date of the settlement (*f*). If at the time of bringing the action no debt due at the execution of the settlement remains unpaid, and there is no evidence to show that the settlement had for its object the delaying, hindering, or defrauding of subsequent creditors, the settlement prevails against them (*g*), but if any debt due at the date of the settlement remains unsatisfied at the time of bringing the action (*h*), or if there be evidence to show that the settlement was made in contemplation of future debts or in furtherance of a meditated design of future fraud, although the settlor may not have been indebted at the time (*i*),

(*b*) *Ib.*

(*c*) *Tarback v. Marbury*, 2 Vern. 509.

(*d*) *Stileman v. Ashdown*, 2 Atk. 481 ; *Stephens v. Ollive*, 2 Bro. C. C. 91 ; *Holloway v. Millard*, 1 Madd. 414 ; *Holmes v. Penney*, 3 K. & J. 99 ; *Murphy v. Abraham*, 15 Ir. Ch. 371.

(*e*) *Spirett v. Willows*, 3 D. J. & S. 302 ; *Freeman v. Pope*, 5 Ch. 544.

(*f*) *Jenkyn v. Vaughan*, 3 Drew. 419 ; *Barton v. Vanheuythysen*, 11 Ha.

132 ; *Freeman v. Pope*, 5 Ch. 544.

(*g*) *Jenkyn v. Vaughan*, 3 Drew. 419 ; *Smith v. Tatton*, 6 L. R. I. 41. See *Russell v. Hammond*, 1 Atk. 13 ; *Thompson v. Webster*, 7 Jur. N. S. 531.

(*h*) *Jenkyn v. Vaughan*, 3 Drew. 419 ; *Freeman v. Pope*, 5 Ch. 544.

(*i*) *Stileman v. Ashdown*, 2 Atk. 481 ; *Richardson v. Smallwood*, Jac. 552 ; *Holloway v. Millard*, 1 Madd. 414 ; *Murphy v. Abraham*, 15 Ir. Ch. 371 ; *Graham v. O'Keefe*, 16 Ir.

or if it be a necessary inference to be drawn from the facts and dates that the deed was executed with a view to defeat persons who might become creditors (*k*), the deed will be set aside (*l*). If a settlement is set aside as fraudulent against creditors whose debts accrued before its execution, subsequent creditors are entitled to participate (*m*): but if antecedent creditors cannot make out a case for setting it aside, subsequent creditors cannot impeach the settlement as fraudulent by reason of the prior indebtedment (*n*).

"The Statute of Elizabeth," said Vice-Chancellor Kindersley in *Jenkyn v. Vaughan* (*o*), "avoids deeds which are made with intent to defraud or delay creditors. The instrument must be made with the intent to defraud creditors. Now no doubt an instrument may be executed for the purpose of defrauding subsequent creditors, and with regard to creditors being so at the time, it is established that it is not necessary to show from anything actually said or done by the party that he had the express design by the deed to defeat creditors, but if he includes in it property to such an amount that having regard to the state of his property and to the amount of his liabilities, its effect may probably be to delay or defeat creditors, if the Court is satisfied of that, the deed is within the meaning of the Statute. In cases where a subsequent creditor files a bill, it occurs to me that much may depend on this (supposing there is no evidence of anything to show the fraudulent intention but the fact of the settlor being indebted to some extent) whether at the time of filing the bill any of the debts remain due which were due when the deed was executed. In such a case as any of the prior creditors might file a bill, it appears to me that a subsequent creditor might do so too, but if at the time of filing a bill

Ch. 1; *Spirett v. Willows*, 3 D. J. & S. 302; *Ware v. Gardiner*, 7 Eq. 321; *Freeman v. Pope*, 5 Ch. 544.

(*k*) *Burling v. Bishop*, 19 Beav. 417; *Reese River Co. v. Atwell*, 7 Eq. 351.

(*l*) See *Whittington v. Jennings*, 6 Sim. 496.

(*m*) *Richardson v. Smallwood*, Jac.

552; *Ede v. Knowles*, 2 Y. & C. C. 172; *Barton v. Vanheythuysen*, 11 Ha. 132.

(*n*) See *Holloway v. Millard*, 1 Madd. 419; *Walker v. Burrows*, 1 Atk. 94; *Ede v. Knowles*, 2 Y. & C. C. 172, 178.

(*o*) 3 Drew. 424.

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no debt due at the execution of the deed remains due, the distinction may be that then a subsequent creditor could not file a bill unless there was some other ground than the settlor being indebted at the date of the deed to infer an intention to defraud creditors. However, I do not find any such rule laid down, and I shall not take upon myself to lay it down positively. But if a subsequent creditor files a bill and you can show that the person who executed the deed, though indebted at the time he made it has since paid every debt, it is very difficult to say that he executed the settlement with an intention to defeat or delay creditors, since his subsequent payment shows that he had not such intention. But it appears to me in the absence of authority to the contrary that a subsequent creditor may file a bill if any debt due at the date of the deed remains due at the time of filing the bill."

The fact that the settlor at the date of the settlement was largely engaged in speculative transactions (*p*), or was about to engage in a hazardous business (*q*), is, of course, strong evidence that, notwithstanding his apparent solvency, the real intention of the settlor was to place the property beyond the reach of his creditors, and the fact that he has already made provision for the objects of the settlement may not be immaterial in estimating the *bona fides* of the transaction (*r*). It is immaterial in such cases that there are no creditors whose debts arose before the date of the settlement (*s*).

Power of revocation in settlement evidence of fraud.

A power of revocation inserted in a deed has always been looked on as strong evidence of fraud as against creditors, and will in general make it void under the Statute (*t*). It is the same where there is a *de facto* power of revocation though not in express terms (*u*), or where there is an equivalent to what is a power of revocation (*x*).

(*p*) *Crossley v. Elworthy*, 12 Eq. 158.

(*q*) *Mackay v. Douglas*, 14 Eq. 106; *Re Pearson*, 3 Ch. D. 808; *Ex parte Russell*, 19 Ch. D. 588.

(*r*) *Crossley v. Elworthy*, 12 Eq. 158.

(*s*) *Mackay v. Douglas*, 14 Eq. 106.

(*t*) *Jenkyn v. Vaughan*, 3 Drew. 427; *Smith v. Hurst*, 10 Ha. 30.

(*u*) *Turback v. Marbury*, 2 Vern. 509.

(*x*) *Acraman v. Corbett*, 1 J. & H. 410.

In order to make a voluntary settlement or conveyance void as against creditors, whether existing or subsequent, it is indispensable that it should transfer property which would be liable to be taken in execution for the payment of debts (*y*). Under the old law a voluntary settlement of stock or choses in action, or of copyholds, or of any other property not liable to execution was not within the statute (*z*): but copyholds, bonds, money, stock, &c., being under Statute 1 Vict. c. 100, seizable in execution are now within the Statute (*a*).

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What property
is within the
statute.

If a deed of voluntary settlement be duly executed, effect will be given to it, though it has been retained by the grantor, and without notice of it having been given to any person (*b*). In *Exton v. Scott* (*c*), when a man having received money belonging to B. without any communication with him, executed a deed of mortgage to B. for the amount, and retained possession of it in his custody for twelve years and then died insolvent, it was held good against creditors, there being no fraud connected with it, the settlor having been solvent at the time of its execution, and there being no evidence to show that the deed was meant to be an escrow (*d*).

Retention of
deed by settlor
will not prevent
its operation.

Although as between creditors a voluntary bond will not prevail (*e*), a creditor under a voluntary covenant (*f*), or bond (*g*), although *post obit*, is as much entitled to the benefit of the Statute 13 Eliz. c. 5, even in equity, as any other creditor (*h*).

Claimants under
voluntary instru-
ment within
statute.

Estates or interests in lands or chattels, &c., conveyed or

13 Eliz. c. 5,
s. 13, exception

(*y*) See *Dundas v. Dutens*, 1 Ves. 365.
Jr. 196; *Caillaud v. Estwick*, Anst. 381; *Nantes v. Corrock*, 9 Ves. 188, 189; *Rider v. Kidder*, 10 Ves. 368; *Guy v. Pearkes*, 18 Ves. 196.

(*z*) *Ib.*; *Horn v. Horn*, Amb. 79; *Cochrane v. Chambers*, *ib.* n.; *Norcutt v. Dodd*, Cr. & Ph. 100.

(*a*) *Norcutt v. Dodd*, *ib.*; *Barrack v. McCulloch*, 3 K. & J. 110; *French v. French*, 6 D. M. & G. 95; *Warden v. Jones*, 2 D. & J. 76; *Stokoe v. Cowan*, 29 Beav. 637.

(*b*) *Waj's Trust*, 2 D. J. & S.

(*c*) 6 Sim. 31.

(*d*) Comp. *Lloyd v. Attwood*, 3 D. & J. 655; *Cracknall v. Junson*, 11 Ch. D. 22.

(*e*) *Goldicutt v. Townsend*, 28 Beav. 445; *Lomas v. Wright*, 2 M. & K. 769.

(*f*) *Fletcher v. Fletcher*, 4 Ha. 67; *Alexander v. Brume*, 19 Beav. 436, 7 D. M. & G. 525.

(*g*) *Payne v. Mortimer*, 1 Giff. 118.

(*h*) *Adames v. Hallett*, 6 Eq. 468.

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where deed is for
valuable con-
sideration and
bonâ fide.

assured *bonâ fide* and for good consideration without notice to the party who is dealing with the person who afterwards becomes unable to pay his debts of any fraud or collusion, are by the 6th section excepted from the operation of the Statute 13 Eliz. c. 5 (*i*). There being a similar exception in 27 Eliz. c. 4, s. 3, and the two statutes being *in pari materiâ*, the cases which have been determined upon the one are equally applicable to the other.

In order to come within the exception, and escape from the operation of the Statute, it is not sufficient that a conveyance be upon good consideration or *bonâ fide*. It must be both for good consideration and *bonâ fide*. Although a deed be made upon good consideration within the meaning of the Statute, it is void against creditors, unless it be *bonâ fide* (*k*). The expression "good consideration" in the Statute means valuable consideration. Meritorious consideration, such as love, affection, &c., though good as between the parties themselves, is not in the eye of the law *bonâ fide*, if it is inconsistent with that good faith which is due to creditors (*l*).

Marriage a
sufficient
consideration.

Marriage is in itself a sufficient consideration for an antenuptial settlement upon the husband, wife, or issue (*m*); and in the absence of fraud the settlement made by one of the contracting parties is not invalidated by reason of the settlement made by the other proving ineffective, as by reason of his or her infancy, nor does any case of election arise as against the other party or his or her representatives (*n*).

When the
marriage is not
a valid one.

But a settlement made in pursuance of an agreement entered into in contemplation of a marriage not recognised as valid by

(*i*) *Supra*, p. 176.

(*k*) *Twyne's Case*, 3 Rep. 81; *Worsley v. De Mattos*, 1 Burr. 474, 475; *Cudogan v. Kennett*, Cowp. 434; *Bott v. Smith*, 21 Beav. 516; *Harman v. Richards*, 10 Ha. 81; *Thompson v. Webster*, 4 Drew. 628; *Lloyd v. Attwood*, 3 D. & J. 655; *Fraser v. Thompson*, 4 D. & J. 600; *Corlett v. Radcliffe*, 14 Moo. P. C. 121, 135; *Middleton v. Pollock*, 2 Ch. D. 108.

(*l*) *Copis v. Middleton*, 2 Madd. 430; *Taylor v. Jones*, 2 Atk. 600; *Strong v. Strong*, 18 Beav. 408; *Goldsmith v. Russell*, 5 D. M. & G. 547; *Thompson v. Webster*, 7 Jur. N. S. 531; *Golden v. Gillam*, 20 Ch. D. 392.

(*m*) *Ex parte M'Burnie*, 1 D. M. & G. 441.

(*n*) *Campbell v. Ingilby*, 21 Beav. 567, 1 D. & J. 393. See however *Codrington v. Lindsay*, 8 Ch. 593.

the laws of this country, as between a man and his deceased wife's sister, cannot (at any rate as far as it is executory (o)), be supported (p) even as respects a provision made thereby for children of a former legal marriage (q); and the same rule, it is conceived, will equally apply where the marriage, though a *bonâ fide* one is invalid by reason of one of the parties having contracted a previous marriage which, although not known to be so, is still subsisting. In the case of a settlement executed as part of the arrangements of a marriage within the prohibited degrees, there is not merely the absence of a good consideration, but the presence of that which the Courts necessarily treat as an immoral consideration, namely an agreement for concubinage instead of coverture. But a voluntary settlement upon the woman herself, if not founded upon an agreement for, although it in fact precedes a concubinage of this description, and which purports on the face of it to be voluntary, cannot be set aside by the settlor or his representatives, if it has been perfected by an actual transfer of the property to the trustees (r).

A question is frequently raised as to how far the consideration of marriage extends. As against the settlor and his heirs, limitations in favour of collaterals contained in an ante-nuptial settlement are binding (s), but whether they will be supported as against creditors or subsequent *bonâ fide* purchasers for value has been the subject of frequent discussion (t). Limitations in favour of collaterals in a marriage settlement are as a general rule voluntary (u), but they will be upheld if there be any party to the settlement who purchases on their behalf (x). There are two exceptions to the rule that the valuable consideration of marriage extends only to the husband, wife, and issue of the marriage, and not to collaterals. The first is in

How far the
consideration
of marriage
extends.

(o) *Ayerst v. Jenkins*, 16 Eq. 275.

(p) *Coulson v. Allison*, 2 D. F. & J. 521.

(q) *Chapman v. Bradley*, 33 Beav. 61.

(r) Dart, V. & P. 893.

(s) *Davenport v. Bishop*, 1 Ph. 698; but see *Wollaston v. Tribe*, 9 Eq. 44.

(t) Dart, V. & P. 893; May on

Fraud. Conv. 326—344; *Clarke v. Wright*, 6 H. & N. 84; *Mullins v. Guilfoyle*, 2 L. R. I. 109.

(u) *Johnson v. Legard*, T. & R. 295; *Smith v. Cherrill*, 4 Eq. 390; *Wollaston v. Tribe*, 9 Eq. 44.

(x) *Heap v. Tonge*, 9 Ha. 104; *Mullins v. Guilfoyle*, 2 L. R. I. 109.

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favour of a settlement made before a second marriage on the children of a former marriage (*y*). The second is in favour of a settlement made on the children of either of the marrying parties by a future marriage (*z*).

In *Clarke v. Wright* (*a*), Lord Blackburn was of opinion that if the limitations in an ante-nuptial settlement in favour of collaterals so far interfere with those which would naturally be made in favour of the husband, wife, and issue, that they must be presumed to have been agreed upon by all parties as part of the marriage contract, they are not voluntary, and will be upheld. But in a later case *Malins, V.-C.*, held that an ante-nuptial settlement containing trusts in favour of the husband, wife, and issue, and also ulterior trusts for collaterals was, so far as the ulterior trusts were concerned, voluntary (*b*).

Post-nuptial
settlements
when valid
against creditors.

A post-nuptial settlement made in pursuance of articles or of a binding written agreement drawn up before marriage is valid against creditors, but a parol ante-nuptial agreement does not prevent a post-nuptial settlement from being voluntary (*c*), nor will a written recognition after marriage of a verbal promise made upon marriage support a post-nuptial settlement against creditors (*d*). Nor can a post-nuptial settlement be supported against creditors if made in pursuance of articles entered into during infancy, and not ratified or referred to in the settlement (*e*). Post-nuptial settlements are, as a general rule voluntary deeds, and therefore void as against creditors; the fact that a post-nuptial settlement may be founded on a moral duty will not deprive it of its voluntary character (*f*). But a post-nuptial settlement becomes a settlement for valuable con-

(*y*) *Newstead v. Scarles*, 1 Atk. 265; *Clarke v. Wright*, 6 H. & N. 849; *Gale v. Gale*, 6 Ch. D. 144.

(*z*) *Sutton v. Chetwynd*, 3 Mer. 249; *Clayton v. Winton*, 3 Madd. 302 n.; but see *Wollaston v. Tribe*, 9 Eq. 44.

(*a*) 6 H. & N. 869.

(*b*) *Smith v. Cherrill*, 4 Eq. 390.

(*c*) *Randall v. Morgan*, 12 Ves. 67; *Lussence v. Tierney*, 1 Mac. & G.

551; *Warden v. Jones*, 2 D. & J. 76; *Goldicutt v. Townsend*, 28 Beav. 445; *Crossley v. Elworthy*, 12 Eq. 164.

(*d*) *Randall v. Morgan*, 12 Ves. 67; *Warden v. Jones*, 2 D. & J. 76.

(*e*) *Trowell v. Shenton*, 8 Ch. D. 318.

(*f*) *Holloway v. Headington*, 8 Sim. 324; *Jefferys v. Jefferys*, Cr. & Ph. 138, 141.

sideration if made in consideration of the receipt of a further portion (*g*), or of an agreement to pay a further portion which is afterwards paid (*h*), or (on a settlement of the husband's estate) of the wife relinquishing her interest under an existing settlement (*i*); or her jointure (*j*), or dower (if married before the late Act came into operation) (*k*); or mortgaging her separate estate (*l*), or property over which she had a just power of appointment (*m*), to pay his debts.

So, also, when in a post-nuptial settlement there is a bargain between husband and wife, altering their relative positions as to the estate, and their relative rights and interests in the estate, there is a valuable consideration for the settlement (*n*). Where, accordingly, by a post-nuptial settlement certain freeholds belonging to the wife were settled by the husband and wife to the use of the wife for life, and after her decease to such uses as she should by will appoint, and in default of appointment, to the use of children, with a power during her life for the wife to lease at rack-rent, and with a power of sale and exchange in the trustees with her consent, it was held that, inasmuch as the husband by the settlement lost his estate by the curtesy and also his power of preventing the wife from alienating the estate during his life, while on the other hand the wife was reduced by the same instrument from being an owner in fee to a life estate with a testamentary power of appointment, the estate going in default to her children, both of them had given value, and that the settlement therefore was one for valuable consideration (*o*).

So, also, in *Hewison v. Negus* (*p*), where the wife was entitled in reversion to a moiety in freehold estates, and by a post-nuptial settlement husband and wife by a deed duly acknowledged conveyed their moiety of the estate, subject to

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| (<i>g</i>) <i>Brown v. Jones</i> , 1 Atk. 190 ; | <i>coram</i> Lord Hatherley. |
| <i>Stileman v. Ashdown</i> , 2 Atk. 479 ; | (<i>m</i>) See <i>Whitbread v. Smith</i> , 3 D. |
| <i>Ramsden v. Hylton</i> , 2 Ves. 308. | M. & G. 740. |
| (<i>h</i>) <i>Brown v. Jones</i> , 1 Atk. 190. | (<i>n</i>) <i>Re Foster and Lister</i> , 6 Ch. D. |
| (<i>i</i>) <i>Parker v. Carter</i> , 4 Ha. 409 ; | 87. |
| <i>Harman v. Richards</i> , 10 Ha. 81. | (<i>o</i>) <i>Ib</i> . |
| (<i>j</i>) <i>Cottle v. Fripp</i> , 2 Vern. 220. | (<i>p</i>) 16 Beav. 594, 22 L. J. Ch. |
| (<i>k</i>) Sug. 718. | 655. |
| (<i>l</i>) <i>Carter v. Hind</i> , 22 L. T. 116, | |

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the prior life estate, to trustees and their heirs upon trust to pay the rents to the wife for life for her separate use, and without power of anticipation, with remainder to the husband for life, and after the decease of husband and wife to such persons as the wife should by will appoint, and in default of appointment to the use of her children as tenants in common in fee, with cross remainders between them, with an ultimate limitation to the wife or heirs, it was held that, inasmuch as the husband had given up his chance of an estate during the coverture and of an estate by the curtesy, and had also given his wife the first life interest in the estate, and the wife on the other hand had given up her fee simple, there was a bargain for value between them, and that the settlement was therefore one for valuable consideration, and ought to be sustained against a subsequent purchaser for value. So, also, in *Teasdale v. Braithwaite* (q), where a woman having freehold estates married without a settlement and afterwards husband and wife conveyed by deed duly acknowledged the land to trustees during the life of the wife upon trust for her separate use without power of anticipation, and after her death to the use of the husband for life, with remainder to their children as therein mentioned, it was held that there was sufficient consideration moving from the husband to make the settlement one for valuable consideration, and that it was not void as against a subsequent mortgagee without notice of the settlement. "It is settled," said Bacon, V.-C. (r), "that if husband and wife, each of them having interests, no matter how much or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife which is not a transaction without valuable consideration (s)." But a settlement concurred in by husband and wife is

(q) 4 Ch. D. 85, 5 Ch. D. 630.

(r) *Ib.*, 4 Ch. D. 90.

(s) See *Parker v. Carter*, 4 Ha. 409; *Lynch v. Lynch*, 2 L. R. I. 511; *Welman v. Welman*, 15 Ch. D. 570; *Mullins v. Guilfoyle*, 2 L. R. I. 110. Inasmuch as under the Married Women's Property Act, 1882, the

husband takes no interest in the property of the wife, where the marriage has taken place since the passing of the Act, post-nuptial settlements, which under the old law were deemed to have been made for a valuable consideration, where there was a modification of the interests of

voluntary, if they merely take back under the settlement such interests as they were respectively entitled to independently of the settlement (*t*).

So, also, money laid out by the husband on land devised to his wife for life with remainder to her children, or in default, &c., to her in fee was held good consideration for a conveyance of it to the use of the wife for life, remainder to her children in fee, and if no children to the husband absolutely (*u*). So, also, where a wife was entitled to certain property for her life for her separate use, remainder to the husband for life, with remainder to their children as they should appoint, and she conveyed her life estate to trustees for the benefit of her children, and the husband covenanted to assign his life interest, if he should survive his wife, it was held that settlement was for valuable consideration (*x*).

In certain cases a settlement made upon a wife after marriage is not to be treated as wholly voluntary, where it is done in performance of a duty which a court of equity would enforce. Thus, if a man should contract a marriage by stealth with a woman having a considerable fortune in the hands of trustees, and he should afterwards make a suitable provision on her in respect of her fortune, the settlement would not be set aside in favour of the creditors of the husband, since a court of equity would not suffer him to take possession of her fortune, without making a suitable settlement on her (*y*).

In *Price v. Jenkins* (*z*), it was held by the Court of Appeal that a settlement of leasehold property is not a voluntary conveyance under the statute on the ground that the assignment of leasehold property is of itself a conveyance for valuable

Settlement of
leaseholds.

husband and wife in the property of the wife, must now be regarded as voluntary.

(*t*) *Butterfield v. Heath*, 15 Beav. 408; *Acraman v. Corbett*, 1 J. & H. 422.

(*u*) *Crofts v. Middleton*, 2 K. & J. 208.

(*x*) *Joyce v. Hutton*, 12 Ir. Ch. 77.

(*y*) *Moore v. Rycault*, Prec. Ch. 22.

and other cases cited 1 Fonb. Bk. 1, c. 4, s. 12, and note (*b*), ib. c. 2, s. 6; *Jones v. Marsh*, Ca. t. Talb. 64; *Wheeler v. Caryl*, Amb. 121; *Jewson v. Moulson*, 2 Atk. 417; *Middlecombe v. Marlow*, ib. 519; *Ward v. Shallett*, 2 Ves. 16; *Ramsden v. Hyllton*, ib. 304; *Arundell v. Phipps*, 10 Ves. 139.

(*z*) 5 Ch. D. 621.

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consideration on account of the implied obligation to perform the covenants in the lease (*a*). But in *Lee v. Matthews* (*b*), the Court of Appeal in Ireland dissented from the judgment in that case, and declined to follow it. "The question," said Chief Justice May, "in each case is, was the dealing a bargain or a gift? The existence of onerous liabilities, from which the covenantee covenants to indemnify the assignor, may give the transaction the character of a bargain for good and valuable consideration, while, on the other hand, the gift of a valuable interest in lands is not less a gift because the property so given carries with it certain obligations. The gift is thereby diminished, but it does not necessarily lose its essential character of gift because it must be taken *cum onere*." And, in *Ridler v. Ridler* (*c*), the Court of Appeal held that *Price v. Jenkins*, though it might perhaps be supported in cases arising under the Statute of 27 Eliz. c. 5, did not apply in cases coming under 13 Eliz., and that a settlement of leaseholds, though carrying liabilities and covenants, was void under that statute as being under the circumstances calculated to defeat and delay creditors (*d*).

Concurrence of third party in settlement may make it for value.

If a person whose concurrence the parties think essential joins in a settlement, his concurrence will be deemed a valuable consideration, even although he did not substantially part with anything (*e*). The concurrence in such cases depends not so much on whether the concurrence passed any interest as on whether it enabled a settlement to be made which could not otherwise have been effected (*f*). The joinder of a necessary party is not, however, always a sufficient consideration. It has been held not to be so where a limitation was made not for his benefit, or at his desire, or in pursuance of any contract of his (*g*). In separation deeds the covenant usually entered into by the trustees to indemnify the husband against the wife's debts will,

(*a*) See *Ex parte Hillman*, 10 Ch. 52 L. J. Ch. 190.

D. 622; *Ex parte Doble*, 26 W. R. (e) Sug. 719.

407.

(*b*) 6 L. R. I. 530.

(*f*) *Harman v. Richards*, 10 Ha.

87.

(*c*) 22 Ch. D. 74.

(*g*) *Doe v. Rolfe*, 8 A. & E. 650.

(*d*) See *Marshall v. Lord Granville*,

as against creditors and also, it is conceived, as against subsequent purchasers, support any further settlement he may make on her (*h*).

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A deed which appears on its face to be voluntary, may be shown by any evidence (consistent with its terms) to have been made for valuable consideration (*i*), but the evidence must be clear, and it must be proved beyond the shadow of a doubt that there was that additional consideration which the parties did not choose to put on the face of the instrument (*k*).

Consideration
not expressed
may be proved.

If the execution of a voluntary deed be not communicated to the party benefited, there cannot be a question of consideration. There can be no consideration without either contract in the first instance, or such notice on the part of the party benefited by the voluntary instrument, as after knowledge of it changes his position. If, after the voluntary settlement has been executed, its contents are communicated to the person taking the benefit of it, and, acting on the faith of it, he does substantially alter his position—that is, communicates to the donor his acceptance of the further security—then, by so doing, he gives value to the donor, being the value which the donor expected him to give. He has, in fact, accepted the voluntary instrument as a consideration for the action he takes on the faith of it. But where he has no knowledge, it is impossible that he can give consideration in that way (*l*).

A deed, though voluntary at the time of its execution, may afterwards become valuable by a consideration given since its execution (*m*), or by subsequent acts. If an assignment or appointment has been made to a volunteer, the subject of which is afterwards assigned for value by the assignee or appointee, the

Voluntary deed
may become for
value by con-
sideration given
since its execu-
tion.

(*h*) Dart, V. & P. 891; May on Fraud. Conv. 285—294.

(*i*) *Pott v. Todhunter*, 2 Coll. 76; *Gale v. Williamson*, 8 M. & W. 405; *Harman v. Richards*, 10 Ha. 81; *Kelson v. Kelson*, 10 Ha. 385; *Townend v. Toker*, 1 Ch. 446; *Levy v. Creighton*, 22 W. R. 605.

(*k*) *Thompson v. Webster*, 4 D. &

J. 605; *Graham v. O'Keefe*, 16 Ir. Ch. 1; *Levy v. Creighton*, 22 W. R. 605.

(*l*) *Jones v. Bygott*, 44 L. J. Ch. 487, per Jessel, M. R. See *Cracknell v. Janson*, 11 Ch. D. 1.

(*m*) *Prodgers v. Langham*, 1 Sid. 133; *Parr v. Eliason*, 1 East, 95.

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purchaser from him has a better equity than the creditors (*n*). A man who has made a voluntary grant is not entitled to have it set aside except on paying all that the transferee has paid for it (*o*).

Purchase of a
settlement for
third parties
is within sec. 6.

The benefit of section 6 has been extended to cases in which the purchaser, innocent of any fraud on the part of the owner of the property, has, by making a loan or payment, become a purchaser, not for his own benefit, but for the purpose of inducing the settlor to settle the property on his family (*p*). In *Bayspoole v. Collins* (*q*), where the owner of an equity of redemption settled it upon his wife and children at the request of a near relative, and, in consequence of a small advance by way of loan upon the security of his promissory note, the settlement was upheld as being for valuable consideration. So, also, where a man being in embarrassed circumstances, his mother agreed to advance the money necessary to relieve him from his embarrassment, on condition of his settling his estate on his family, the transaction was upheld as being one for valuable consideration (*r*). So, also, where a man entitled to a life interest in the dividends of consols, being largely indebted, his brother agreed to pay all debts, not charged on his life interest in the consols, upon condition that such life interest should be settled so as to be applicable for the maintenance of the man, his wife and children, or any of them, at the absolute discretion of the trustees, the settlement was held valid as one made for valuable consideration (*s*). So, also, where A. and B. were indebted and, being under threat of eviction, executed a deed, afterwards registered as a bill of sale, whereby, in consideration of the payment of the debt by the father-in-law of one of them, they conveyed to him the farm and all its chattels, the deed was held to be for valuable consideration (*t*).

(*n*) *George v. Milbank*, 9 Ves. 190;
Morewood v. South Yorkshire, &c.,
Railway Co., 3 H. & N. 798.

(*o*) *Lord Aldbrough v. Trye*, 7 Cl.
& Fin. 463. See *Judd v. Green*, 45
L. J. Ch. 111.

(*p*) *Thompson v. Webster*, 4 D. &
J. 605, 7 Jur. N. S. 531, in Dom.

Proc.

(*q*) 6 Ch. 228.

(*r*) *Thompson v. Webster*, 7 Jur. N.
S. 531, in Dom. Proc.

(*s*) *Holmes v. Penney*, 3 K. & J.
98. See *Ex parte Eyre*, 44 L. T. N.
S. 922.

(*t*) *Smith v. Tatton*, 6 L. R. I. 41.

In considering whether or not a deed is voluntary, the Court will take into consideration all the circumstances under which it was executed, and the relative positions of the parties, and will look at other deeds executed at the same time, if they appear to be part of the same transaction, although not mentioned in the impeached deed, and will take into consideration any evidence which tends to throw light on the reasons and considerations for the settlement, and, though there is no proof either by intrinsic evidence or by anything appearing on the face of the deeds of any stipulation or agreement which there was sufficient consideration to support, yet several transactions may be viewed together, and the parties to them must be considered to have stipulated according to the rights which they had, and any consideration which is found to exist will either support the whole transaction or none at all (*u*).

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Rules for determining whether a deed is voluntary.

It is not enough, in order to support a settlement against creditors, that it be made for valuable consideration. It must also be *bonâ fide*. If it be made with intent to delay, hinder, or defraud creditors, it is void against them, although there may be, in the strictest sense of the term, a valuable or even an adequate consideration (*x*). Cases have frequently occurred in which persons have given a full and fair price for goods, and where the possession has been actually changed, yet being done for the purpose of delaying or defeating creditors, the transaction has been held fraudulent, and has therefore been set aside as against them (*y*). In *Harman v. Richards* (*yy*), Lord Justice Turner, then a Vice-Chancellor, says, "It remains to be considered whether the settlement which was thus made for valuable consideration was also *bonâ fide*; for a deed, though made for valuable consideration, may be affected by *mala fides*, but those who undertake to impeach the *bona fides* of a deed which has been executed for valuable consideration have a task of difficulty." "The fact that there is a valuable consideration,"

Deed must be *bonâ fide*.

(*u*) *Harman v. Richards*, 10 Ha. 88. Burr. 474, 475; *Cudogan v. Kennett*, Cowp. 434; *Bott v. Smith*, 21 Beav.

(*x*) *Twyne's Case*, 3 Rep. 81; 511.
Holmes v. Penney, 3 K. & J. 99. (*yy*) 10 Ha. 81.

(*y*) *Ib.*; *Worsley v. De Mattos*, 1

said Mr. Justice Fry, in *Golden v. Gillam* (z), “shows at once that there may be a purpose in the transaction other than the delaying or defeating of creditors, and renders the case of those who contest the deed more difficult.”

Where the instrument sought to be set aside as fraudulent against creditors is founded on a valuable consideration, an actual and express intent to defeat creditors must be proved (a).

The mere fact of a *bonâ fide* creditor being defeated is not enough of itself to set aside a deed founded on valuable consideration (b). In *Holmes v. Penney* (bb), the creditor was excluded from all remedy in respect of his debt, and the existence of the debt must have been present to the mind of the settlor at the time of the settlement, but Lord Hatherley, then a Vice-Chancellor, being of opinion that the person who advanced the money as the consideration of the settlement, had no knowledge at the time of the settlement that there were any unpaid debts of the settlor in existence, and that his only object was to make an honest family arrangement, upheld the deed (c). So, also, in *Golden v. Gillam* (d), where it appeared to be the object of a mother and daughter to make an honest family settlement, under which the mother conveyed a farm to the daughter, and the daughter, in consideration of the conveyance, undertook to maintain the mother and to pay creditors whose debts had been contracted in connection with the carrying on of the farm, the settlement was upheld, though there was outstanding a debt of another description to which the covenant did not apply, the Court being of opinion that the settlement was a *bonâ fide* one, and that the debt in question was not present to the mind of the settlor or her daughter at the time of the settlement.

The inquiry in every case is whether the deed was executed with the intent to defeat or delay creditors. The mere fact that, as a collateral result, it may have that effect will not

(z) 20 Ch. D. 396.

(bb) 3 K. & J. 98.

(a) *Freeman v. Pope*, 5 Ch. 538,
per Giffard, L. J.

(c) See *Ex parte Eyre*, 44 L. T. N.
S. 922.

(b) *Smith v. Tutton*, 6 L. R. I.

(d) 20 Ch. D. 396.

make the deed void within the statute, if it was otherwise made for good consideration and *bonâ fide* (e).

If the deed be for valuable consideration, it is immaterial that the settlor may retain a life interest under it (f). But if there is any secret trust or any proviso to pay the settlor the dividends until execution issue, the settlement would be fraudulent though made for value (g). In the case of a merely voluntary settlement, the fact that the settlor may derive any benefit under it would probably be fatal to the deed (h).

It is not a ground for invalidating a *bonâ fide* sale that it was made with a view to defeat an intended execution. The sale of property for good consideration made *bonâ fide* and with a *bonâ fide* intention to pass the property, is sufficient to defeat the execution of a creditor (i). Nor is it a fraud to mortgage personal property for money actually lent to the mortgagor, even though the mortgagor's intention may be thus to defeat the expected execution of a judgment creditor (k); or to confess a judgment in favour of one creditor for the purpose of giving him preference over another who is on the eve of issuing execution on a judgment previously obtained (l).

The consideration of marriage, although the most valuable of all considerations, if there be *bona fides* (m), will not support a settlement by a man in insolvent or embarrassed circumstances, if there be evidence to show that the intended wife was implicated in any design to delay or defraud the creditors of the intended husband, or that the marriage was part of a scheme or contrivance between them to protect his property against the claims of his creditors (n). But an ante-

(e) *Ib.*(f) *Holmes v. Penney*, 3 K. & J. 98; *Thompson v. Webster*, 7 Jur. N. S. 531.(g) *Holmes v. Penney*, 3 K. & J. 98.(h) *Ib.* 101.(i) *Wood v. Dixie*, 7 Q. B. 892; *Hale v. Saloon Omnibus Co.*, 4 Drew. 496; comp. *Bott v. Smith*, 21 Beav. 511.(k) *Darvill v. Terry*, 6 H. & N. 807.(l) *Holbird v. Anderson*, 5 T. R. 235.(m) *Campion v. Cotton*, 17 Ves. 264; *Ex parte McBurnie*, 1 D. M. & G. 441; *Dilkes v. Broadmead*, 2 D. F. & J. 566.(n) *Colombine v. Penhall*, 1 Sm. & G. 228; *Fraser v. Thompson*, 4 D. & J. 660; *Bulmer v. Hunter*, 8 Eq. 49.

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nuptial settlement made by a man when insolvent is valid against creditors, so far as concerns the interests of the wife and children, though it may contain a false recital, if the wife had no knowledge of the insolvency of the husband or of the false recital (*o*). Though the marriage be *bonâ fide* and the settlor solvent at the date of the settlement, a general covenant in an antenuptial settlement made by a trader that all his after-acquired property shall be subject to the trusts of the settlement is void as against creditors (*p*).

Inadequacy of
consideration,
when evidence
of *mala fides*.

Mere inadequacy of consideration is not in general a circumstance which will of itself make an assignment void as against creditors (*q*), but the inadequacy must not be so great as to induce the belief that the transaction was a mere fraudulent contrivance between the parties to defraud creditors (*r*), so that when a man in a hopeless condition assigned to his mother policies of assurance on his life amounting to £800 in consideration of a debt of £180 owing to her, it was set aside as a fraud against creditors (*s*). If it appear that the consideration stated to have been paid was not really *bonâ fide* paid, or was afterwards returned, such a sale will not be allowed to override a prior conveyance, although voluntary (*t*); and when the estate is conveyed as security for money to be thereafter advanced, it must be proved that money has actually been advanced on the mortgage (*u*). But a vendor's giving back part of the purchase-money to the purchaser's family does not invalidate the sale (*x*). A conveyance, though made for valuable consideration, may under certain circumstances be fraudulent against subsequent purchasers (*y*).

When the transaction is on the whole fair and honourable

(*o*) *Kevan v. Crawford*, 6 Ch. D. 30.

(*p*) *Re Clint*, 17 Eq. 120.

(*q*) *Copis v. Middleton*, 2 Madd. 423.

(*r*) *Twyne's Case*, 3 Rep. 83 b.; *Doe v. James*, 16 East, 213; *Strong v. Strong*, 18 Beav. 408; *Hale v. Albutt*, 18 C. B. 527.

(*s*) *Stokoe v. Cowan*, 29 Beav. 637.

(*t*) *Humphreys v. Pensam*, 1 M. & C. 580; *Roberts v. Williams*, 4 Ha. 130; *Mullins v. Guilfoyle*, 2 L. R. I. 113.

(*u*) *Doe v. Webber*, 1 A. & E. 740.

(*x*) *Doe v. James*, 16 East, 214, per Lord Ellenborough.

(*y*) *Perry-Herrick v. Atwood*, 2 D. & J. 21.

and not induced by the fraudulent intention of defeating creditors or purchasers, the Court is not very particular as to the amount of the consideration (*z*). It is enough if it is valuable and not so entirely inadequate as from its insufficiency to induce the presumption of fraud. The smallness of the consideration is not a matter the Court will go into, except so far as it is evidence that the transaction was a sham (*a*). The case is all the stronger when the instrument is between relatives. In such cases, less than in others, will the Court weigh in very nice scales the amount of the consideration (*b*), or hold that the difference between the real value of the estate and the consideration given is a badge of fraud, or evidence of an intention to defraud creditors (*c*). In a case accordingly where husband and wife jointly seised in fee mortgaged the estate limiting the equity of redemption to such uses as they or the survivor should appoint, and the property was reconveyed by their appointment to the use of the wife for life, with remainder to the use of the husband for life, with remainder to uses in favour of their issue, it was held that her concurrence in the settlement made by the reconveyance was a sufficient consideration to support it against a subsequent purchaser from the husband (*d*). So if a postnuptial settlement be made with the aid of another person whose concurrence is essential to its full validity, as is the case of a settlement by tenant for life and tenant in tail in remainder, this may take from the instrument its voluntary character (*e*). So a family compromise founded on doubtful intestacy is valid (*f*). But of course the fact of the grantees having had estates in the property which, as in the case of estates in remainder on an estate tail, have been destroyed by the settlor will not support the settlement (*g*).

(*z*) *Holmes v. Penney*, 3 K. & J. S. 532.

90; *Atkinson v. Smith*, 3 D. & J. 186; *Thompson v. Webster*, 4 D. & J. 605; *Townend v. Toker*, 1 Ch. 446; *Price v. Jenkins*, 5 Ch. D. 621; *Rosher v. Williams*, 20 Eq. 217.

(*a*) *Bagspoole v. Collins*, 6 Ch. 228.

(*b*) *Thompson v. Webster*, 7 Jur. N.

(*c*) *Townend v. Toker*, 1 Ch. 446; *Bagspoole v. Collins*, 6 Ch. 232; *Golden v. Gillam*, 20 Ch. D. 396.

(*d*) *Atkinson v. Smith*, 3 D. & J. 186.

(*e*) *Dart, V. & P.* 891.

(*f*) *Heap v. Tonge*, 9 Ha. 90.

(*g*) *Cormick v. Trapaud*, 6 Dow, 60.

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Nominal
consideration
insufficient.

A nominal consideration is insufficient to support a deed. When accordingly a deed conveying the whole real estate of the grantor and otherwise voluntary contained a covenant by the grantor that under certain specified circumstances and within a limited period he would build a house on part of the estate conveyed, but there was no shifting clause or proviso for defeasance in case of non-performance of the covenant, it was held that the covenant raised no consideration affecting the voluntary nature of the contract (*g*).

Purchaser must
have notice of
fraud.

When there has been a sale for value, not only must fraud be shown, but, in order to avoid the transaction as against a purchaser, it must be shown that he was privy to the fraud against creditors. A conveyance cannot be invalidated where there is a *bonâ fide* purchaser (*h*). The fraudulent intent of the vendor or settlor will not invalidate the deed if the purchaser was free from fraud (*i*). Even though there may be some suspicion in the circumstances of the case, the purchase will be held good unless it is shown that it was a contrivance to defeat creditors and that the purchaser was privy to it (*k*).

When a recovery was suffered by A., tenant for life, and B. his son, tenant in tail in remainder, and by the deed leading the uses of the recovery, A.'s life estate was limited to B. in order to defraud A.'s creditors, and subject thereto the property was settled on B. for life, with remainder to his first and other sons in tail, but B. was not privy to the fraud, it was held that the recovery was good, and that the deed leading to uses was bad, so that A.'s life estate passed to his assignees in a subsequent bankruptcy, and subject thereto B. became entitled in fee simple (*l*). A conveyance pending an action or judgment is not necessarily void if supported by a valuable consideration (*m*).

Purchase money
may not be taken

The benefit of the section which excepts from the operation

(*g*) *Rosher v. Williams*, 20 Eq. 210.

(*h*) *Copis v. Middleton*, 2 Madd. 426.

(*i*) *French v. French*, 6 D. M. & G. 401; *Golden v. Gillam*, 20 Ch. D. 394.

(*k*) *Hale v. Saloon Omnibus Co.*, 4

Drew. 496.

(*l*) *Tarleton v. Liddell*, 17 Q. B. 390; 4 Deg. & Sm. 538; *Wakefield v. Gibbon*, 1 Giff. 401.

(*m*) See *Marlow v. Orgill*, 8 Jur. N. S. 789, 829; *Darvill v. Terry*, 6 H. & N. 807.

of the statute conveyances made *bonâ fide* and for valuable consideration is strictly confined to the purchaser and the interest created in his favour, so that even when there is a *bonâ fide* purchaser, the consideration received for property sold by a debtor is liable to the same rules as the property would have been if unsold (*n*).

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so as to defeat
creditors.

A fraudulent intention to which the purchaser is a party will override all inquiry into the consideration (*o*). "If," said Lord Mansfield, in *Cadogan v. Kennett* (*p*), "the transaction be not *bonâ fide*, the circumstance of its being done for a valuable consideration will not alone take it out of the statute." If moreover the purchaser must have been aware that the debtor was in a state of insolvency, or that the effect of the deed will be to leave the debtor without the means of paying his debts, the transaction, though for value, cannot be upheld (*q*).

Mala fides
supersedes
consideration.

Though there be a judgment against the vendor, and the purchaser has notice of it, that fact will not of itself affect the validity of the sale of personal property. But if the purchaser, knowing of the judgment, purchases with the view and purpose to defeat the creditor's execution, it is iniquitous and fraudulent, notwithstanding he may have given a full price, for it is assisting the debtor to injure the creditor. The question of fraud depends on the motive (*r*).

In *Barling v. Bishop* (*s*) a voluntary conveyance with the intention of depriving the plaintiff in an action of the fruits of his verdict was held bad. So also, when the object of the deed was to defeat proceedings under a winding up, it was held bad (*t*).

The absence of any fraudulent intention on the part of the debtor is not sufficient to uphold the settlement, if the settlement has been procured by the fraud of the donor. The

(*n*) *French v. French*, 6 D. M. & G. 103.

G. 95; *Neale v. Day*, 28 L. J. Ch. 45.

(*o*) *Acraman v. Corbett*, 1 J. & H. 423.

(*p*) *Cowp.* 434.

(*q*) *Corbett v. Radcliffe*, 14 Moo. P. C. 135; *French v. French*, 6 D. M. &

(*r*) 1 Burr. 474, *Cowp.* 434, *per* Lord Mansfield; 8 Taunt. 678, *per* Dallas, C. J.

(*s*) 29 Beav. 417.

(*t*) *Reese River, &c., Co. v. Atwell*, 7 Eq. 347.

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distribution accordingly by a debtor, when in a weak state of mind and body, of the whole of his property among his children, partly in consideration of annuities for his life, partly by voluntary settlement, and partly by pecuniary gifts, was held void as against creditors under 13 Eliz. c. 5, the Court being satisfied on the evidence, that the children were aware at the time that the creditor's claim would be defeated, though it did not appear that the debtor had any such intention (*u*).

Bankruptcy Act,
1869, s. 91.
Voluntary
settlements
by traders.

Under the Bankruptcy Act, 1869, s. 91, a voluntary settlement, conveyance or transfer of property made by a trader (*x*), or a postnuptial settlement, conveyance or transfer of property made for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife shall, if the settlor becomes bankrupt within two years after the date of such settlement be void as against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void against such trustee (*y*).

In determining whether a trader, who has executed a voluntary settlement, was within sect. 91 of the Bankruptcy Act, 1869, "at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement," the value of the implements of his trade, and of the goodwill of his business is not, if he was intending to continue his business, to be taken into account (*z*).

Voluntary settlements made by a non-trader, or by traders who have not become bankrupt within the periods named, are still governed by the 13 Eliz. c. 5.

Presumption of
fraud from
debtor remain-
ing in possession
after conveyance.

A strong presumption of fraud against creditors arises where, after a bill of sale of chattel property, purporting on its face to take effect immediately, or to be an absolute conveyance, the

(*u*) *Cornish v. Clark*, 14 Eq. 184.

D. 56.

(*x*) See *Ex parte Hillman*, 10 Ch. D. 622.

(*z*) *Ex parte Russell*, 19 Ch. D. 588.

(*y*) See *Ex parte Hustable*, 2 Ch.

vendor or settlor is after its execution permitted to remain in possession of the property (*a*). It is otherwise, however, if his continuance in possession is consistent with the nature of the transaction, as where a bill of sale is not absolute on its face or in its form, but only conditional, so that possession is not to be given until the condition has been performed (*b*), or when the transaction is in the nature of a mortgage, and there is a proviso that the debtor should remain in possession until default be made (*c*). In *Edwards v. Harben* (*d*) the Court went so far as to say that possession of goods sold under an absolute bill of sale is conclusive evidence of fraud; but the tendency of later decisions has been to qualify that doctrine, and the weight of authority is in favour of the modified doctrine that possession by the vendor or settlor affords only a badge or *prima facie* presumption of fraud, which may be rebutted by explanation, showing the transaction to be fair and honest, and giving a reasonable ground for the retention of possession. The question as to fraud in such cases is not an inference of law, but one of fact for the jury (*e*).

A judgment and execution "contrived of malice," are within the same mischief as a gift or assignment. An early case on this subject is *West v. Skipp*, in which it was laid down by Lord Hardwicke that if a creditor seize the goods of his debtor and suffer them to remain long in his hands, this is evidence of fraud (*f*).

As a creditor was thus left liable to incur a loss by trusting to the false appearance of ownership which the continuance of the debtor in possession of property presented, "an Act for preventing frauds upon creditors by secret bills of sale of personal

Bills of Sale
Acts, 1878 and
1882.

(*a*) *Twyne's Case*, 3 Co. Rep. 81;
Edwards v. Harben, 2 T. R. 587;
Alton v. Harrison, 4 Ch. 622.

(*b*) *Edwards v. Harben*, 2 T. R. 587;
Cudogan v. Kennett, Cowp. 434;
Martindale v. Booth, 3 B. & Ad. 498, 505;
Minshall v. Lloyd, 2 M. & W. 450; but see *infra* as to Bills of Sale.

(*c*) *Alton v. Harrison*, 4 Ch. 622.

(*d*) 2 T. R. 587.

(*e*) *Lady Arundell v. Phipps*, 10 Ves. 145; *Martindale v. Booth*, 3 B. & Ad. 498, 505; *Latimer v. Butson*, 4 B. & C. 652; *Lindon v. Sharp*, 6 M. & G. 895, 898, *per* Tindal, C. J.

(*f*) See *Lovick v. Crowder*, 8 B. & C. 132; *Imray v. Maymay*, 11 M. & W. 267; *Hunt v. Hooper*, 12 M. & W. 664.

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chattels," 17 & 18 Vict. c. 30, was passed, which in certain defined conditions avoided bills of sale of personal chattels, and with the view of securing publicity, specially provided for the registration of bills of sale. An Act was subsequently passed, 29 & 30 Vict. c. 96, for the purpose of amending in certain particulars the former Act. Both the above Acts were repealed by the Bills of Sale Act, 1878, 41 & 42 Vict. c. 31, "An Act to consolidate and amend the law for preventing frauds on creditors by secret bills of sale of personal chattels." An Act, 45 & 46 Vict. c. 43, has been recently passed amending in some particulars the Bills of Sale Act, 1878, which so far as is consistent with the tenor thereof, is to be construed as one with the Bills of Sale Act, 1878, but unless the contract otherwise requires, shall not apply to any bill of sale duly registered before its commencement, so long as the registration thereof is not avoided by non-renewal or otherwise (*g*).

Under the term "bill of sale," the Act includes assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods (*h*), and other assurances of personal chattels and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt, and also any agreements, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred (*i*); but it does not extend to assignments for the benefit of creditors (*j*), marriage settlements (*k*), transfers of ships (*l*), transfers of goods in the ordinary course of business of any trade or calling (*m*), or bills of sale of goods in foreign

(*g*) 45 & 46 Vict. c. 43, s. 3.

(*h*) See *Marsden v. Meadows*, 7 Q. B. D. 80; *Ex parte Cooper*, 10 Ch. D. 321.

(*i*) See *Ex parte Mackay*, 8 Ch. 643.

(*j*) *General Furnishing Co. v. Fern*, 2 H. & C. 153; *Johnson v. Osenton*, L. R. 4 Exch. 107.

(*k*) A post-nuptial settlement not made in pursuance of ante-nuptial

articles, is not a marriage settlement within the exception, *Foster v. Fowler*, 28 L. J. Q. B. 210; *Ashton v. Blackshaw*, 9 Eq. 510; *Re Reed*, 1 Ch. D. 303.

(*l*) *Swainston v. Clay*, 3 D. J. & S. 558; *Union Bank of London v. Leuanton*, 3 C. P. D. 243.

(*m*) *Ex parte North Western Bank*, 15 Eq. 69; *Re Steel*, 16 Eq. 414.

parts (*n*) or at sea, bills of lading (*o*), India warrants, warehouse keepers' certificates, warrants or orders for the delivery of goods, as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented (*p*).

Under the term "personal chattels," the Act comprehends goods, furniture, and other articles capable of complete transfer by delivery (*q*); and, when separately assigned or charged, fixtures and growing crops, but not chattel interests or real estate, nor fixtures (except trade machinery as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stocks, funds, or securities of any government, or in the capital, or property of incorporated or joint-stock companies, nor choses in action, or any stock or produce upon any farm or lands not removable by reason of any contract or custom (*r*); nor to debentures issued by any mortgage, loan or other incorporated company and secured upon the capital, stock, or goods, chattels and effects of such company (*s*).

The recent Act, 45 & 46 Vict. c. 43, does not apply to bills of sale which may be given otherwise than by way of security for the payment of money (*t*).

Personal chattels are deemed to be in the apparent possession (*u*) of the maker of the bill of sale so long as they remain on any land or premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given

Apparent
possession.

(*n*) See *Coote v. Jacks*, 13 Eq. 597.

(*o*) *Ex parte Watson*, 5 Ch. D. 35.

(*p*) 41 & 42 Vict. c. 31, s. 4.

(*q*) See *Sheridan v. Macartney*, 11 Ir. C. L. 506.

(*r*) 41 & 42 Vict. c. 31, s. 4.

(*s*) 45 & 46 Vict. c. 43, s. 17.

(*t*) S. 3.

(*u*) *Gough v. Everard*, 2 H. & C. 1; *Robinson v. Briggs*, L. R. 6 Exch. 1; *Ex parte Hooman*, 10 Eq. 63; *Ex parte Jay*, 9 Ch. 697.

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to any other person (*x*). If the grantee takes possession of the goods and advertises them for sale, as being under a bill of sale, they are not in the apparent possession of the grantor (*y*); but if he takes possession of household furniture by a broker's man, who remains in the house and sleeps in an upper room, but does not remove any of the furniture or interfere with the use of it by the grantor, and if the grantee subsequently advertises the furniture for sale without mentioning his bill of sale, the advertisement only giving reference to a firm of solicitors for particulars, the goods are still in the possession of the grantor (*z*). An attempt by the grantee to take possession does not affect the grantor's apparent possession (*a*), not even where the grantee is entitled to take such possession (*b*). Where the grantor occupied as servant to the grantee, counting the occupation as part of his salary, the goods were held, nevertheless, to be in the possession of the grantor (*c*).

Mode of registering bills of sale.

The bill of sale with every schedule (*d*) or inventory thereto annexed or therein referred to, and also a true copy of such bill (*e*), and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness, shall be presented to, and the said copy and affidavit shall be filed with the

(*x*) 41 & 42 Vict. c. 31, s. 4. See *Ex parte Mutton*, 14 Eq. 178.

(*y*) *Emanuel v. Bridger*, L. R. 9 Q. B. 286.

(*z*) *Ex parte Lewis*, 6 Ch. 626.
(*a*) *Ex parte Fletcher*, 5 Ch. D. 809.

(*b*) *Ancona v. Rogers*, 1 Exch. D. 285. See *Seal v. Cluridge*, 7 Q. B. D. 519.

(*c*) *Pickard v. Marriage*, 1 Exch.

D. 364.

(*d*) See *Green v. Attenborough*, 3 H. & C. 468.

(*e*) A true copy of a bill of sale need not necessarily be an exact copy. If the errors or omissions in the copy filed are merely clerical and of such a nature that no one can be misled, it is of no consequence. *Re Hewer*, 21 Ch. D. 875.

registrar (*f*) within seven clear days after the making of such bill of sale (*g*).

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Great care is necessary in preparing the affidavit. The time of the execution of the bill of sale by the grantor, and not the time of the attestation or payment of the consideration money, is the time which should be stated in the affidavit (*h*).

The affidavit must show that the bill of sale was duly executed and attested. It must therefore be worded in such a way as to show that the person who attests the execution was present when the execution took place (*i*).

The affidavit must contain a description of the residence and occupation of the person making or giving the bill of sale, and of every attesting witness. Any misdescription or non-description in these particulars will vitiate the bill of sale (*k*).

The object of the form and requisitions prescribed in the Act is to afford to creditors and parties interested a true idea of the position in life of the vendor, and to give such a description of the residence and occupation of the vendor and the witnesses as would enable persons interested in the matter to trace out who is the person giving the bill of sale, and who the witnesses are, so as to ascertain the *bona fides* of the transaction (*l*).

It is not sufficient that the bill of sale contains the required description, the affidavit must also contain them (*m*), and the description of every witness is necessary, if there are more than one (*n*). If, however, the affidavit sufficiently refers to and incorporates the description in the attestation clause, an

(*f*) The affidavit must be filed at the same time as the bill of sale. The clerk has no authority to receive the one without the other. *Grindell v. Brendon*, 6 C. B. N. S. 702.

(*g*) 41 & 42 Vict. c. 31, s. 10, ss. 2.

(*h*) *Darvill v. Terry*, 6 H. & N. 807.

(*i*) *Sharpe v. Birch*, 8 Q. B. D. 111 ; *Ford v. Kettle*, 9 Q. B. D. 139 ; *Re Moulson*, 51 L. J. Ch. 824.

(*k*) *Briggs v. Boss*, L. R. 3 Q. B.

270. An affidavit describing the grantor's residence and occupation "to the best belief" of the deponent has been held sufficient. *Roe v. Bradshaw*, L. R. 1 Exch. 106.

(*l*) *Briggs v. Boss*, L. R. 3 Q. B. 270, *per* Lord Blackburn.

(*m*) *Hatton v. English*, 1 E. & B. 94 ; *Brodrick v. Scale*, L. R. 6 C. P. 98.

(*n*) *Pickard v. Marriage*, 1 Exch. D. 364.

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incomplete description or even omission of description in such affidavit may be thus supplemented (*o*).

So also if a sufficient description be found in the introductory part of the affidavit, it is enough (*p*). The affidavit need not state in terms that the deponent is identical with the attesting witness, if it can be gathered with reasonable certainty that that is so (*q*). A contradictory statement, however, or a mis-statement, cannot be corrected by references (*r*).

The object of the statute was to require the residence to be stated with such an amount of fulness that persons about to give credit should have sufficient information to guide them to the identity of the man whom they intend to trust; and consequently that his residence should be described with not too minute, but with reasonable certainty and sufficiency (*s*). If the error in the description of residence is not calculated to mislead, it will not vitiate a bill of sale (*t*).

In *Briggs v. Boss* (*u*), the description: "I reside at Hanley, in the County of Stafford, and am an accountant," was held sufficient. It was proved that the population of Hanley was 40,000 within the limits of the Parliamentary Borough, and that letters addressed to him with Hanley alone as the direction had reached him.

It is a sufficient description of the residence of the grantor or attesting witness to state his place of business (*x*), and if he be a clerk, that of his employer (*y*).

The description in the affidavit of the residence of the grantor must be that which is true at the time of swearing the affidavit,

(*o*) *Banbury v. White*, 2 H. & C. 300; *Routh v. Roublot*, 1 El. & El. 850; *Jones v. Harris*, L. R. 7 Q. B. 163.

(*p*) *Blaibery v. Parke*, 10 Q. B. D. 95.

(*q*) *Ib.*; *Routh v. Roublot*, 1 El. & El. 850.

(*r*) *Murray v. McKenzie*, L. R. 10 C. P. 628.

(*s*) *Heuer v. Cox*, 3 El. & El. 433, *per* Wightman, J.; *Jones v. Harris*,

L. R. 7 Q. B. 163, *per* Lord Blackburn.

(*t*) *Blount v. Harris*, 4 Q. B. D. 603; *Ex parte M'Hattie*, 10 Ch. D. 398; *Cooper v. Ibberson*, 29 W. R. 566.

(*u*) L. R. 2 Q. B. 370.

(*x*) *Attenborough v. Thompson*, 2 H. & N. 559; *Blackwell v. England*, 8 E. & B. 541; *Grant v. Shaw*, L. R. 7 Q. B. 700.

(*y*) *Grant v. Shaw*, *ib.*

and not that at the time of the execution of the bill of sale (z). But the description is not rendered incorrect so as to avoid the bill of sale by the fact that between the execution of the bill of sale and the date of the affidavit the grantor has left his residence described in the affidavit for America (a).

A company has been held properly described as residing at its principal office (b).

With respect to the description of occupation, it has been held insufficient to describe as "gentleman" only a clerk in the Audit Office (c), or an attorney's clerk (d), or a silk buyer (e); but such a description was held sufficient where the party had no occupation (f).

The description "esquire" alone was held to be fatal to the validity of the security where the grantor was the lessee and manager of a theatre, and occasionally acted, but at the time of executing the bill of sale had no actual engagement (g).

When the grantor was a clerk in the Admiralty, the description "government clerk" was held sufficient (h). In the same case the attesting witness was described as "insurance clerk," which was held to be *prima facie* sufficient.

In *Castle v. Downton* (i), the grantor was at the time he executed the bill of sale a commercial traveller selling on commission, and the affidavit stated that he "was until lately a commercial town traveller or agent." This was held to be insufficient.

In *Briggs v. Boss* (k) the attesting witness in his affidavit described himself as "an accountant," residing at Hanley. He

(z) *Button v. O'Neill*, 4 C. P. D. 354.

(a) *Re Hewer*, 21 Ch. D. 875.

(b) *Shears v. Jacob*, L. R. 1 C. P. 513.

(c) *Allan v. Thompson*, 1 H. & N. 15.

(d) *Tuton v. Sanoner*, 3 H. & N. 293; *Beales v. Tennent*, 29 L. J. Q. B. 188.

(e) *Adams v. Graham*, 33 L. J. Q. B. 71.

(f) *Morewood v. South Yorkshire Railway Co.*, 3 H. & N. 798; *Bath v. Sutton*, ib. 382; *Nicholson v. Cooper*, ib. 384; *Grant v. Shaw*, L. R. 7 Q. B. 700; *Broderick v. Scale*, ib., 6 C. P. 98.

(g) *Ex parte Hooman*, 10 Eq. 63.

(h) *Grant v. Shaw*, L. R. 7 Q. B. 700.

(i) 5 C. P. D. 56.

(k) L. R. 3 Q. B. 268.

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was in fact clerk to an accountant residing at Manchester, who had an office with his name upon it at Hanley. The witness was his managing clerk, and occasionally did business as an accountant on his own account. The description was held sufficient. But in *Larchin v. North Western Deposit Bank* (l), where the grantor was clerk in the accountant's department at the Euston Square Station of the London and North Western Railway, and was described in the affidavit as an accountant, it was held that the requirements of the statute were not satisfied, though in his leisure time he was employed to value a tradesman's books.

Where a bill of sale and the affidavit described grantors who were father and son as mantle-makers, carrying on business together under a specified firm, but at the time the bill of sale was executed the partnership between them had been dissolved and the business was carried on by the father alone, the son being in his employment as clerk, it was held that there was no misdescription (m).

Casual or temporary occupation need not be stated, but only the fixed business by which a man gains his living (n). When the description is *primâ facie* sufficient, the *onus* lies on those who say it is not to show that the person is not what he is described (o). Apparent absence of occupation will not, if there be in fact occupation, justify non-description of it (p), but if no occupation is stated, the *onus* of proving occupation is on those who impugn the validity of the bill of sale (q). When the attesting witness is of no occupation, his description in the affidavit may be left in blank (r).

A widow who at the time of giving the bill of sale had actually ceased to carry on her former occupation of a publican,

- | | |
|---|---|
| (l) L. R. 10 Exch. 64. | (p) <i>Smith v. Cheese</i> , 1 C. P. D. |
| (m) <i>Ex parte Popplewell</i> , 21 Ch. D. 80. | 60; <i>Sutton v. Bath</i> , 3 H. & N. 382. |
| (n) <i>Sutton v. Bath</i> , 3 H. & N. 382; <i>Ex parte National Mercantile Bank</i> , 15 Ch. D. 50. | (q) <i>Morewood v. South Yorkshire Railway Co.</i> , 3 H. & N. 798. |
| (o) <i>Grant v. Shaw</i> , L. R. 7 Q. B. 700. | (r) <i>Ex parte Young</i> , 28 W. R. 924. |

but who intended shortly to, and did afterwards resume such occupation, may sufficiently describe herself as "widow" (s). Chap. IV.
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If the bill of sale is made or given subject to any defeasance, or condition or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void (t). Defeasance or
condition must
be registered.

In case one or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of date of their registration respectively as regards such chattels (u). Priority of bills
of sale.

A transfer or assignment of a registered bill of sale need not be registered (v). Transfer of bill
of sale need not
be registered.

The registration of a bill of sale must be renewed every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal, as the case may be, the registration shall be void (x). Upon the re-registration of a bill of sale, the affidavit must set forth the names and addresses of the parties as stated in the bill of sale, though such description may be erroneous (y). Renewal of
registration.

Every bill of sale shall be duly attested, and shall be registered within seven clear days after the execution thereof; or if it is executed in any place out of England, then within seven clear days after the time at which it would arrive in England, if posted immediately after the execution thereof, and shall truly set forth the consideration for which it was given, otherwise Registration of
bill of sale.

(s) *Ex parte Chapman*, 45 L. T. N. S. 268.

(t) 41 & 42 Vict. c. 31, s. 10, ss. 3. See *Robinson v. Collingwood*, 17 C. B. N. S. 777; *Ex parte Southam*, 17 Eq. 578; *Ex parte Collins*, 10 Ch. 367; *Ex parte Odell*, 10 Ch. D. 76; *Ex parte Papplewell*, 21 Ch. D. 80.

(u) 41 & 42 Vict. c. 31, s. 10. A bill of sale attested and registered

under the Act takes priority over one that is earlier in date but unattested and unregistered. *Counelly v. Stear*, 7 Q. B. D. 520.

(v) 41 & 42 Vict. c. 31, s. 10.

(x) 41 & 42 Vict. c. 31, s. 11. See as to mode of renewal, *ib.*

(y) *Ex parte Webster*, 22 Ch. D. 136.

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Statement of
consideration.

such bill of sale shall be void in respect of the personal chattels comprised therein (z).

The consideration must be set forth in the body of the deed ; if not truly stated there a correct statement contained in a receipt at the foot of the deed will not satisfy the statute, such receipt not being part of the deed (a). The consideration required to be stated is that which the grantor receives for giving the bill of sale, not necessarily the amount to be secured by the deed (b). If part of the consideration stated on a bill of sale is by the grantor's direction given at the time of the execution of the deed applied in satisfying a then existing debt owing by him, the money so applied may be properly stated in the deed to be money then paid to him (c).

The amount of the expenses incident to the preparation of the bill of sale is not such a "then existing debt owing by the grantor," and the deduction of it from the amount stated to be advanced as the consideration will invalidate the bill of sale (d). So, also, if a specified sum of money be stated to be the consideration of a bill of sale, and it appears that the whole of that sum was not paid to the borrower, but a deduction was made for commission on the loan and expenses (e), or for interest and expenses (f), the bill of sale is invalidated. So, also, when a bill of sale was expressed to be made "in consideration of 50*l.* by the assignee paid to the assignor at or before the execution of the deed ;" but it appeared that 25*l.* was kept back by the lender for future rent of the borrower's house and for his own better security, it was held that the consideration was not truly stated (g).

(z) 45 & 46 Vict. c. 43, s. 8. The clause is not retrospective. *Hickson v. Darlow*, W. N. (1883), 26, 31 W. R. 361.

(a) *Ex parte Charing Cross Bank*, 16 Ch. D. 35.

(b) *Ex parte Challinor*, 16 Ch. D. 260.

(c) *Ex parte Firth*, 19 Ch. D. 419, overruling *Ex parte National Mercantile Bank*, 15 Ch. D. 42, and *Ex*

parte Challinor, 16 Ch. D. 260, so far as they decided that the expenses incidental to the deed might be deducted from the amount stated to be advanced.

(d) *Ex parte Firth*, 19 Ch. D. 419.

(e) *Hamilton v. Chainé*, 7 Q. B. D. 319.

(f) *Ex parte Charing Cross Bank*, 16 Ch. D. 34.

(g) *Ex parte Rolph*, 19 Ch. D. 100.

The Act does not require a collateral agreement between the grantor and grantee as to the application of the consideration to be set forth (*h*). What the borrower means to do with the money has nothing to do with the consideration moving from the borrower to the lender. The fact that part of the money may have gone to pay off debts to other persons with the grantor's assent does not render the statement of consideration inaccurate. It is competent to him to direct what should be paid to himself and what should be paid to others on his behalf (*i*). A distinction has also been taken between strict literal accuracy and accuracy with respect to either the legal or the business or mercantile effect of the matters set forth (*k*). Thus, where A. being indebted to B. gave him a bill of sale to secure the sum of 7,350*l.*, which on stating the accounts between them was found to be the balance due, and by such bill of sale this sum was to be paid by A., with interest, on demand in writing, and the bill of sale recited that B. had agreed to lend A. 7,350*l.*, and the consideration for such bill of sale was stated therein to be 7,350*l.* thus paid by B. to A., it was held that the bill of sale truly set forth the consideration, although no money in fact passed from B. to A. at the time the bill of sale was given (*l*). So, also, where A. sold a brewery and certain chattels to B. for 2,500*l.*, and B. sold his bargain to C., whereupon A. and B. executed a conveyance to C., but C. being only able to pay A. 500*l.*, gave A. a mortgage of the brewery and chattels to secure the balance of 2,000*l.* due to A., which was expressed to be given "in consideration of the sum of 2,000*l.* to C. paid by A. immediately before the execution of these presents," it was held that the consideration was truly stated (*m*).

A collateral agreement, such as an agreement not to register, need not be stated. It is not part of the consideration for the deed (*n*).

(*h*) *Ex parte National Mercantile Bank*, 15 Ch. D. 42; *Ex parte Rolph*, 19 Ch. D. 100.

(*i*) *Hamlyn v. Betteley*, 5 C. P. D. 327.

(*k*) *Credit Co. v. Pott*, 6 Q. B. D. 299, *per Brett*, L. J.

(*l*) *Ib.* See *Carrard v. Meek*, 50 L. J. Q. B. 187; *comp. Ex parte Berwick*, 29 W. R. 292; *Ex parte Carter*, 12 Ch. D. 908.

(*m*) *Ex parte Bolland*, 21 Ch. D. 543.

(*n*) *Ex parte Popplewell*, 21 Ch. 80.

Chap. IV. Sect. 1.	Every bill of sale to which the Act applies shall have annexed to it or written upon it a schedule containing an inventory of the personal chattels comprised in the bill of sale, and such bill of sale with certain exceptions shall have effect only in respect of the chattels specifically described in the schedule, and except as against the grantor shall be void in respect of the personal chattels not so specifically described (<i>o</i>).
Schedule of property.	
Form of bill of sale.	A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void, unless made in accordance with the form in the schedule annexed to the Act (<i>p</i>).
Attestation.	The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. It need not be attested or explained to the grantor by a solicitor (<i>q</i>).
Bill of sale not to affect after-acquired property.	A bill of sale is void except as to the grantor in respect of after-acquired chattels, with the exception of growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed, or of fixtures separately assigned or charged (<i>r</i>). Fixtures or growing crops are not to be deemed separately assigned when the land passes by the same instrument (<i>s</i>).
Chattels not to be removed or sold.	All personal chattels seized or of which possession is taken under any bill of sale shall remain on the premises where they were so seized or taken possession of, and shall not be removed or sold until after the expiration of five days from the day they were so seized or taken possession of (<i>t</i>).
Bill of sale under 30 <i>l.</i> void.	Every bill of sale made or given in consideration of any sum less than 30 <i>l.</i> shall be void (<i>u</i>).
Trade machinery.	Trade machinery as defined in the clause is to be deemed
<p>(<i>o</i>) 45 & 46 Vict. c. 43, s. 4. Under the Act of 1878, a bill of sale was good as between grantor and grantee, although not attested or registered under the Act. <i>Davis v. Goodman</i>, 5 C. P. D. 128.</p> <p>(<i>p</i>) 45 & 46 Vict. c. 43, s. 9. See <i>Wilson v. Kirkwood</i>, W. N. (1883)</p> <p>40, as to inserting rate of interest.</p> <p>(<i>q</i>) 45 & 46 Vict. c. 43, s. 10.</p> <p>(<i>r</i>) 45 & 46 Vict. c. 43, ss. 5, 6.</p> <p>(<i>s</i>) 41 & 42 Vict. c. 31, s. 7. See <i>Ex parte Moore's Banking Co.</i>, 14 Ch. D. 379.</p> <p>(<i>t</i>) 45 & 46 Vict. c. 43, s. 13.</p> <p>(<i>u</i>) 1<i>h.</i> s. 12.</p>	

personal chattels (*x*). Where trade machinery is put in substitution for any trade machinery which is already the subject of a bill of sale, the new machinery is not covered by the old security. There must be a registration of the new machinery (*y*).

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Where machinery on land is mortgaged together with the land, this does not constitute a bill of sale of the machinery, but where machinery is only trade machinery, and is conveyed by bill of sale distinct from the land mortgaged, the Act applies (*z*).

Every instrument, except a mining lease, whereby a power of distress is given or agreed to be given by way of security for any debt, and whereby rent is reserved as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of the security only, shall be deemed to be a bill of sale of personal chattels which may be seized or taken under such power of distress (*a*). The section does not extend to the case of a demise by a mortgagee in possession to the mortgagor, as his tenant at a reasonable rent of any estate or interest in any land, tenement, or hereditament (*b*).

Instruments
giving power of
distress within
the Act.

Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—First, if the grantor shall make default in payment of the sum or sums of money thereby received at any time therein provided for payment or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security; secondly, if the grantor shall become bankrupt or suffer the said goods or any of them to be distrained for rent, rates, or taxes; thirdly, if the grantor shall fraudulently either remove or suffer the said goods or any of them to be removed from the premises; fourthly, if the grantor shall not without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes; fifthly, if execution shall

Bill of sale with
power to seize,
except in certain
events, to be
void.

(*x*) 41 & 42 Vict. c. 31, s. 5.

& B. 876.

(*y*) 45 & 46 Vict. c. 43, s. 6.

(*a*) 41 & 42 Vict. c. 31 s. 6.

(*z*) *Mather v. Fraser*, 2 K. & J.

(*b*) *Ib.*

536; *Waterfall v. Peniston*, 6 E.

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have been levied against the goods of the grantor under any judgment at law (*c*).

The grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes apply for an order to restrain the grantee from removing or selling the said chattels, and the court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, will grant it or make such other order as may seem just (*d*).

Assignment
giving preference
to creditors.

Transactions which have for their object the defeating or defrauding of creditors must be carefully distinguished from cases where a sale or assignment or other conveyance merely amounts to giving a preference to one creditor or to one set of creditors over another. The law tolerates assignments giving one creditor a preference over another. The fact that a man may have assigned the whole or the bulk of his property to a creditor or set of creditors and that the assignment may have been expressly made with the intent to benefit some creditors (*e*), or to defeat the claim of a particular creditor is of no consequence under the common law or under the Statute of Elizabeth, if the consideration be adequate (*f*), and the bill of sale or assignment be not a contrivance resorted to by the debtor as a mere cloak for retaining a personal benefit in his own favour (*g*). A payment is *bond fide* within the meaning of the Statute of Elizabeth, if it is intended to be a payment, and a security is *bond fide* if it was intended to be a security, even though the debtor knew he was insolvent, and even although the creditor who accepted the money knew it. The meaning of the Statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst the creditors of the debtor. The creditor of an insolvent debtor who dies without having

(*c*) 45 & 46 Vict. c. 43, s. 7.

(*d*) *Ib*.

(*e*) *Alton v. Harrison*, 4 Ch. 625.

(*f*) *Holbird v. Anderson*, 5 T. R. 235; *Estwick v. Caillard*, *ib*. 420; *Pickstock v. Lyster*, 3 M. & S. 371;

Wood v. Dixie, 7 Q. B. 892; *Hale v.*

Saloon Omnibus Co., 4 Drew. 492;

Middleton v. Pollock, 2 Ch. D. 106;

Ex parte Games, 12 Ch. D. 321.

(*g*) *Alton v. Harrison*, 4 Ch. 625;

Ex parte Games, 12 Ch. D. 321..

been adjudicated a bankrupt is entitled to the benefit of any payment or security made or given by the debtor (*h*). Chap. IV.
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Assignments, conveyances, or gifts, though not fraudulent within the Statute 13 Eliz. c. 5, may be fraudulent as against creditors within the provisions of the bankrupt laws. Any transfer which is fraudulent within the meaning of the Statute of Elizabeth is also fraudulent and an act of bankruptcy under the bankrupt law, and void as against assignees upon an insolvency (*i*). But a conveyance to a creditor of his whole property, or of the whole of his property with an exception merely nominal, in consideration of a bygone or pre-existing debt, though not fraudulent within the Statute of Elizabeth, is fraudulent under the Bankruptcy Act, and an act of bankruptcy (*k*). The principle of the bankrupt laws being the equal distribution of the property and effects of a bankrupt among his creditors (*l*), acts which are done with the object of preventing an equal distribution of the property and effects of a bankrupt among his creditors are fraudulent within the meaning of those laws (*m*). The assignment accordingly by a man of the whole of his estate and effects, or of the whole with a colourable exception of part only under such circumstances as necessarily to defeat and delay his creditors, is a fraud within the meaning of those laws, although there be no actual moral fraud (*n*). But where there is a substantial exception out of the debtor's property, such an exception as might possibly enable him to carry on his trade with advantage, an assignment of the whole of the rest of his property cannot be necessarily and by force of law, without reference to extrinsic circumstances showing fraud, an act of bankruptcy (*o*). In such a case it would be necessary to prove some other circumstances

(*h*) *Middleton v. Pollock*, 2 Ch. D. 35; *Woodhouse v. Murray*, L. R. 2 Q. B. 637; *Allen v. Bonnett*, 5 Ch.

(*i*) *Doe v. Ball*, 11 M. & W. 531.

(*k*) *Ailen v. Bonnett*, 5 Ch. 580; *King*, 2 Ch. D. 263; *Ex parte Stevens*, 20 Eq. 786; *Ex parte Payne*, 11 Ch. D. 539.

(*l*) *Woodham v. Murray*, L. R. 2 Q. B. 637.

(*m*) *Young v. Wood*, 8 Exch. 234.

(*n*) *Smith v. Cannon*, 2 E. & B.

(*o*) *Pennell v. Reynolds*, 11 C. B. N. S. 709; *Lomas v. Buxton*, L. R. 6 C. P. 112, *per* Willes, J.

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besides the mere execution of the deed to satisfy the Court that it was intended to be a fraud upon creditors (*p*). Whether an exception is substantial enough depends on the circumstances of the case (*q*). If the property excepted out of the assignment is property which cannot be taken in execution by a creditor, it does not constitute a substantial exception (*r*). Nor is there a substantial exception when a trader assigns everything except his household furniture and book debts of small value (*s*). So also a deed is invalid although a substantial part of the property be not comprised in it, if the necessary consequence of it be to cause insolvency or to defeat and delay creditors (*t*). The rule applies with peculiar force, if the fact of his embarrassed circumstances be known or must be necessarily taken to be known to the assignee (*u*). In determining whether a bill of sale comprises the whole of the debtor's property, the value of his book debts is to be taken into consideration (*x*).

Assignment for
an advance of
money is not
fraudulent.

The assignment by a trader of his property and effects for a present advance of money is not necessarily a fraud upon the bankrupt laws, though the whole of his stock, present and future, is included in the conveyance. A present substantial advance puts the transaction upon the same footing as an assignment with a substantial exception of part of the property. The advance may be the means of enabling him to go on with his trade, and so the transaction may be beneficial to creditors. If the conveyance be made *bonâ fide* for the purpose of enabling him to carry on his business, it cannot be called a fraudulent act as tending to defeat or delay creditors, although the property or effects have been sold or pledged for a sum less than their value. A *bonâ fide* sale of goods in a season of pressure by a trader for whatever ready money can be obtained is valid, though the price be small. The proportion

(*p*) *Ib.*

(*q*) *Ex parte King*, 2 Ch. D. 263,
per Mellish, L. J.

(*r*) *Ex parte Hawker*, 7 Ch. 214.

(*s*) *Ex parte Blund*, 6 D. M. & G.
761.

(*t*) *Smith v. Cannon*, 2 E. & B. 45 ;

Young v. Waul, 8 Exch. 221; *Ex parte Wensley*, 1 D. J. & S. 281 ; *Re Wood*, 7 Ch. 305.

(*u*) *Young v. Fletcher*, 3 H. & C. 732.

(*x*) *Ex parte Burton*, 13 Ch. D. 102 ; *Ex parte Field*, *ib.* 106 n.

which the sum raised bears to the value of the property sold or pledged is a circumstance to be considered in determining whether the transaction is *bonâ fide* or not, but it is not conclusive that it is fraudulent (*y*). It is for the Court to say whether, under all the circumstances of the case, the effect of the assignment is to defeat or delay creditors (*z*). If, however, there was in the minds of the parties the sinister object of defeating or delaying creditors, the advance of even a substantial part of the value of the property at the time of the assignment will not make the transaction valid. But the Court will not hold that a deed conveying property in consideration of a present advance which bears a substantial proportion to the value of the property to be invalid unless it is satisfied that there exists an intention to defeat and delay and consequently to defraud creditors; and that object must be the object not only of the bankrupt but also of the party who is dealing with him. A person dealing *bonâ fide* with the bankrupt would be safe. Unless he knows, or from the very nature of the transaction must be taken necessarily to have known, that the object was to defeat or delay creditors, the deed cannot be impeached (*a*). A conveyance by a trader of all his property was held fraudulent upon creditors within the meaning of the bankrupt laws, even though made in consideration of marriage, it being shown that the wife was cognizant of the embarrassed state of the husband's affairs (*b*).

An assignment of all a trader's effects to secure a present advance or present and future advances *bonâ fide* agreed to be made for the purpose of enabling him to carry on his business, is not an act of bankruptcy (*c*). So, also, an assignment by a trader of all his effects to secure an advance to enable him to

(*y*) *Bittlestone v. Cooke*, 6 E. & B. 307; *Bell v. Simpson*, 2 H. & N. 410; *Pennell v. Reynolds*, 11 C. B. N. S. 709. See *Ex parte Wensley*, 1 D. J. & S. 281.

(*z*) *Lee v. Hart*, 11 Exch. 880; *Pennell v. Reynolds*, 11 C. B. N. S. 709; *Ex parte Cohen*, 7 Ch. 22; *Ex parte Cooper*, 10 Ch. D. 325.

(*a*) *Pennell v. Reynolds*, 11 C. B. N. S. 722; *Fraser v. Levy*, 6 H. & N. 16. See *Re Colemere*, 1 Ch. 128.

(*b*) *Colombine v. Penhall*, 1 Sm. & G. 228; *Bulmer v. Hunter*, 8 Eq. 49.

(*c*) *Hutton v. Crutwell*, 1 E. & B. 15; *Bittlestone v. Cooke*, 6 E. & B. 296; *Harris v. Rickett*, 4 H. & N. 1; *Ex parte Dunn*, 17 Ch. D. 26.

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satisfy a pressing demand and thus to continue his business, is not of itself an act of bankruptcy (*d*); and, if the advance be to pay off a subsisting charge on the property, the transaction will be protected, although the security is not transferred, but a new mortgage is executed (*e*), even although the person advancing the money had notice of an act of bankruptcy committed by the debtor (*f*).

A security comprising all the debtor's property for an existing debt arising from a loan previously made will not be an act of bankruptcy if it is made in performance of an agreement, whether written or parol (*g*), *bonâ fide* entered into at the time of the loan (*h*). But an agreement of this sort will not protect the transaction, if it is not absolute but conditional to give a security on the request of the creditor, and such request is purposely postponed until the debtor is in a state of insolvency in order to prevent the destruction of his credit which would result from registering the deed (*i*). Such a transaction will be regarded as evidence of a design to commit a fraud on the general creditors (*k*). Nor can a man under a secret unregistered agreement borrow money with which to carry on business, enjoy credit, contract debts, and acquire property subject to an undertaking that at any moment he may be called on to pay the money or else to give up not merely the property he had at the time of the bill of sale, but all the property he might have acquired (*l*).

Assignment by
debtor partly in
consideration of
a past debt and
a fresh advance
of money.

An assignment by a debtor of all his property and effects partly as a security for a past debt and partly as a security for a substantial fresh advance, is not necessarily an act of bankruptcy. If the assignment is made not merely for an antecedent

(*d*) *Hutton v. Cruttwell*, 1 E. & B. 15; *Harris v. Rickett*, 4 H. & N. 1; *Whitmore v. Claridge*, 33 L. J. Q. B. 87; *Re Colemere*, 1 Ch. 128; *Lomax v. Buxton*, L. R. 6 C. P. 112.

(*e*) *Ex parte Harris*, 19 Eq. 253; *Ex parte Mutton*, 14 Eq. 178.

(*f*) *Ex parte Harris*, 19 Eq. 253.

(*g*) *Harris v. Rickett*, 4 H. & N. 1; *Ex parte Foxley*, 3 Ch. 515.

(*h*) *Harris v. Rickett*, 4 H. & N. 1; *Mercer v. Peterson*, L. R. 3 Exch. 104; *Jones v. Harber*, L. R. 6 Q. B. 77; *Ex parte Fisher*, 7 Ch. 636; *Ex parte Izard*, 9 Ch. 271.

(*i*) *Ex parte Fisher*, 7 Ch. 636; *Ex parte Burton*, 13 Ch. D. 102.

(*k*) *Ex parte Fisher*, 7 Ch. 636.

(*l*) *Ex parte Hauxwell*, W. N. (1883), 31.

debt but also for a present further advance, of which the debtor really has the advantage and which he can apply to the purchase of stock or otherwise for his use, the transaction is considered on the same footing as if there was a substantial exception out of the debtor's property, and is therefore not necessarily *per se* an act of bankruptcy (*m*). It is not necessary to the validity of the transaction that a security should be given at the time of the advance. The rule applies where a sum of money is advanced upon the faith of a contract that a bill of sale shall be given. If a bill of sale is subsequently given in performance of an agreement entered into at the time of the further advance, it stands upon the same footing, and will have the same effect with respect to creditors, as if it had been given at the time of the further advance (*n*).

But if the giving of the bill of sale is purposely postponed till the circumstances of the debtor become hopeless and he is on the verge of bankruptcy, the antecedent agreement will not support it (*o*). Nor will the agreement to give a bill of sale be upheld, if it appear to have been concocted between the creditor and the debtor for the purpose of evading the remedy which the Act as to bills of sale intended to provide for the benefit of creditors (*p*).

In order that the execution of a bill of a sale of substantially the whole of a debtor's property and effects as a security for a pre-existing debt, and further advances may not be an act of bankruptcy, it is necessary that there should be an agreement binding the grantee to make further advances. It is not sufficient that further advances should have been in the contemplation of the parties, the deed being so stamped as to cover them and further advances having been actually made after the execution of the deed (*q*). But is enough if there is a contem-

(*m*) *Lomax v. Buxton*, L. R. 6 C. P. 112; *Allen v. Bonnett*, 5 Ch. 577; *Ex parte Fisher*, 7 Ch. 642.

(*n*) *Hutton v. Cruttwell*, 1 E. & B. 15; *Mercer v. Peterson*, L. R. 3 Exch. 105; *Ex parte King*, 2 Ch. D. 263; *Ex parte Fisher*, 7 Ch. 642.

(*o*) *Ex parte Fisher*, *ib.*; *Ex parte*

Burton, 13 Ch. D. 102; *Ex parte Kilner*, *ib.* 249.

(*p*) *Ex parte Cohen*, 7 Ch. 20; *Ex parte Stevens*, 20 Eq. 786; *Ex parte Hawcwell*, W. N. (1883), 31; *Ex parte Hole*, *ib.* 32.

(*q*) *Ex parte Dann*, 17 Ch. D. 26.

poraneous parol agreement on the part of the creditor to make further advances to a sufficient amount, and such advances are afterwards in fact made, even though the deed contains no covenant or obligation on the part of the creditor to make further advances (*r*). In *Ex parte Wilkinson* (*s*), there was a parol agreement on the part of the creditor to make fresh advances, but no covenant or written agreement binding him to do so, and the transaction was upheld.

Where a bill of sale comprising the whole of the grantor's property is given on the eve of bankruptcy to secure a pre-existing debt, and it is attempted to support it by an agreement alleged to have been made at the time the money was advanced, it is for the Court to judge from all the surrounding circumstances whether the agreement was a *bonâ fide* one, or whether the bill of sale was purposely postponed in order to protect the grantor's credit. The *onus probandi* is upon the person who sets up the prior agreement to prove not only that the agreement did exist, but that it was in all respects a *bonâ fide* agreement (*t*).

It is not essential for the validity of transactions of this sort by way of security that the advance should be of equal value with the existing debt or the property charged, if it be *bonâ fide* to enable the debtor to carry on his business (*u*). Neither is it essential that the equivalent should be a sum of money paid down. If the debtor has something done for him that will enable him to carry on his business, that will be a sufficient equivalent, as where the drawer of bills of exchange took them up at maturity at the request of the acceptor (*v*). So, also, where the agreement was to supply goods on credit and they were supplied (*x*).

To constitute a substantial advance, it is not necessary that there should be money actually paid down. It is enough if a trader carrying on his business has something done for him

(*r*) *Re Winstanley*, 1 Ch. D. 290.

(*s*) W. N. (1883), 16.

(*t*) *Ex parte Kilner*, 13 Ch. D. 246; *Ex parte Hawcwell*, W. N. (1883), 31; *Ex parte Hole*, ib. 32.

(*u*) *Ex parte Fisher*, 7 Ch. 642;

Ex parte Izard, 9 Ch. 271.

(*v*) *Ex parte Reed*, 14 Eq. 593.

(*x*) *Ex parte Sheen*, 1 Ch. D. 560.

which will enable him to continue carrying it on (*y*). The payment accordingly of bills by the drawee at the request of the acceptor is a substantial advance, and prevents the assignment by a man of all his property and effects from being an act of bankruptcy (*yy*). An honest giving of time to a trader may be as fair and valuable an equivalent as an advancement of money (*z*). But the forbearance of the grantee of a bill of sale to enforce a judgment is not a sufficient consideration for an assignment of the whole of the debtor's property to secure a past debt (*a*).

Whether or not a further advance is a substantial one or only intended to give colour to a security which is in reality made only for the purpose of securing a pre-existing debt, is a question to be determined on the circumstances of each particular case (*b*). It is not a question whether the further advance is great or small, but whether there was a *bond fide* intention of carrying on the business (*c*). Though however the smallness of the fresh advance does not necessarily make the conveyance an act of bankruptcy, it affords evidence that the principal object of the parties in the whole transaction was not to enable the debtor to continue his business or meet his engagements but to secure the past debt (*d*). Though there may be an advance in point of form, yet if from the mode in which the advance is made, it comes into the hands of the debtor under such circumstances that he does not get the real enjoyment of the money so advanced, the advance will not prevent the transaction from being an act of bankruptcy (*e*).

The lapse of twelve months from the date of a deed by a trader assigning all his estate and effects before any *fiat* issues will prevent the deed from being invalidated as an act of bankruptcy (*f*). "If," said Lord Justice Giffard in *Allen v.*

(*y*) *Re Tweddell*, 14 Eq. 593.

(*yy*) *Ib.*

(*z*) *Philps v. Hornstedt*, 1 Exch. D. 62.

(*a*) *Ex parte Cooper*, 10 Ch. D. 325; *Ex parte Payne*, 11 Ch. D. 529.

(*b*) *Ex parte King*, 2 Ch. D. 262; *Ex parte Holr*, W. N. (1883), 32.

(*c*) *Ex parte Ellis*, 2 Ch. D. 798,

per Mellish, L. J.

(*d*) *Ex parte Fisher*, 7 Ch. 642; *Philps v. Hornstedt*, 1 Ex. D. 62; *Ex parte King*, 2 Ch. D. 256.

(*e*) *Graham v. Chapman*, 12 C. B. 85. See *Lomax v. Buxton*, L. R. 6 C. P. 112, *per Willes*, J.

(*f*) *Allen v. Bonnett*, 5 Ch. 577; *Lomax v. Hutton*, L. R. 6 C. P. 112.

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Bonnett (g), "the deed be without consideration or the consideration has been in substance fictitious, or if the deed was not intended to operate according to its tenor and effect, or was a fraudulent preference, or was void as being obnoxious to the provisions of the 13 Eliz. c. 5, the lapse of more than twelve months from its execution would be of no importance, but where these circumstances do not arise, the lapse of twelve months before any *fiat* issues validates that which would be otherwise impeachable" (*h*).

Fraudulent
transfer.

Bankruptcy Act,
1869, sect. 6,
sub-sect. 2.

It is enacted by the Bankruptcy Act, 1869, s. 6, sub-s. 2, that it shall be an act of bankruptcy if the debtor has in England or elsewhere (*i*) made a fraudulent conveyance, gift, delivery or transfer of his property, or of any part thereof. A bill of sale accordingly of his whole property executed by a non-trader to secure a past debt was held to be an act of bankruptcy (*k*). But where a creditor has in his possession goods belonging to his debtor and subject to a lien for the debt, and the debtor requests him to sell the goods for their joint benefit and to pay himself out of the proceeds the amount due and to hand over to him the balance, the transaction is not a fraudulent transfer, even though it should afterwards turn out that the goods in question were the whole property of the debtor (*l*).

A sale is not a fraudulent transfer because there is an intention in the mind of the vendor to use the purchase-money for the purpose of making a voluntary preference, though the purchaser may know the motive of the sale and the intention of the vendor with respect to the proceeds (*m*). But where a sheriff has seized goods under an execution and before sale the debtor agrees with the execution creditor to sell him the goods seized for the amount of his debt and the sheriff's charges, there is a fraudulent transfer, if the debtor was in a state of insolvency (*n*).

(*g*) 5 Ch. 581.

(*h*) *Ex parte Games*, 12 Ch. D.

321.

(*i*) See *Ex parte Crispin*, 8 Ch.

374.

(*k*) *Re Wood*, 7 Ch. 302.

(*l*) *Philps v. Hornstedt*, L. R. 8 Exch. 30, 1 Exch. D. 62.

(*m*) *Ex parte Stubbins*, 17 Ch. D. 68.

(*n*) *Ex parte Pearson*, 8 Ch. 667.

It is enacted by s. 92 of the Bankruptcy Act, 1869, that "every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own monies (*o*) in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors (*p*), shall, if the person making, taking, paying, or suffering the same become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy; but that this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration" (*q*). To constitute a fraudulent preference within the meaning of the clause, the payment or assignment must be the spontaneous act of the debtor, and it must appear either by necessary inference from the circumstances or by direct evidence that the payment or assignment was made with the sole view of preferring the creditor. Unless it be made clearly apparent that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favour of the creditor. The act of the debtor is alone to be considered, the object and purpose for which the payment is made can alone be enquired into; yet, if the act done can be properly referred to some other motive or reason than that of giving the creditor paid a preference over the other creditors, the payment will not be held to be fraudulent and void (*r*). If there is no ground for imputing such a motive, as if the payment be made on the application of the creditor, or under circumstances tending to interfere with the free will of the debtor, as if there was a *bond fide* application or pressure on the part of the creditor or some person having a

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Fraudulent
preference.
32 & 33 Vict.
c. 71, s. 92.

(*o*) See *Ex parte Blackburn*, 12 Eq. 363; *Butcher v. Stead*, 7 E. & I. App. Ca. 846, per Lord Cairns.

(*p*) See *Ex parte Bolland*, 7 Ch. 27, per Mellish, L. J.; *Ex parte Topham*, 8 Ch. 619, per Mellish, L. J.

(*q*) See *Re Cherry*, 19 W. R. 1005.

Indetermining whether a transaction amounts to fraudulent preference, the Court will have regard to the language of the section. *Ex parte Griffith*, W. N. (1883), 26.

(*r*) *Ex parte Tempest*, 6 Ch. 74; *Ex parte Topham*, 8 Ch. 619.

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right to apply, and the act in any degree proceeded from such application or pressure, there is no fraudulent preference (s). Where, accordingly, a payment has been made under pressure (t), or goods have been returned either from the hope on the part of the debtor that he would obtain further credit or only from the pressure (u), there is no fraudulent preference. "If," said Lord Cairns, in *Tomkins v. Saffery* (x), "the payment or assignment has been made under pressure, the pressure must be taken to be the *causa causans* of the payment or assignment, and not any intention of giving preference to a particular creditor."

But pressure is not necessary to prevent a payment or assignment from being a fraudulent preference. It is sufficient that the payment or assignment be not the spontaneous act of the debtor. If the creditor demands payment, pressure is not necessary on his part to take it out of the class of voluntary acts. A mere *bond fide* demand by a creditor for payment or for a security without any pressure, is sufficient to support a payment or the giving of a security made in consequence (y). It is enough that there be such a demand as partly to influence the debtor in making the payment or giving the security so that he did not make or give it voluntarily. There is in such a case no fraudulent preference, though there may have been a mixed motive, and the creditor may have been a friend whom the debtor wished to prefer (z). Nor is it a fraudulent preference if there be a demand upon a debtor and a yielding to that demand by making a payment which might not otherwise have been made so soon (a).

Other circumstances besides a demand for payment on the part of the creditor may rebut the presumption of fraudulent preference on the part of the debtor. Although the transaction is apparently voluntary if the effect of the evidence is to show that the desire to give a fraudulent preference was not the

(s) *Ib.*

(t) *Ex parte Keran*, 9 Ch. 758.

See *Ex parte Holliday*, 8 Ch. 287.

(u) *Ex parte Topham*, 8 Ch. 620 ;
Smith v. Pilgrim, 2 Ch. D. 127.

(x) 3 App. Ca. 225.

(y) *Strachan v. Barton*, 11 Exch.
650 ; *Johnson v. Fozzemyer*, 3 D. &

J. 24 ; *Ex parte Tempest*, 6 Ch. 74.

(z) *Ex parte Tempest*, 6 Ch. 74 ;
Ex parte Bolland, 7 Ch. 26 ; *Ex*
parte Topham, 8 Ch. 620.

(a) *Tomkins v. Saffery*, 3 App. Ca.
235, per Lord Blackburn. See
Strachan v. Barton, 11 Exch. 650.

motive operating on the debtor in handing over his assets to the particular creditor, the transaction is valid (*b*). If the debtor, though he was aware that bankruptcy was unavoidable, and though no application was made for payment, has paid the debt simply in discharge of an obligation he had entered into to pay it on a given day, or in pursuance of a previous agreement, or if he makes payment to a creditor in the ordinary course of business without any view of giving a preference to the particular creditor at the expense of the general creditors, there is no fraudulent preference within the meaning of the bankrupt law (*c*). "If," said Lord Blackburn, in *Tomkins v. Saffery* (*d*), "a man pays his debts and sends money to meet his bills on the days on which they become due, and does other things so as to keep himself alive and in good credit for the time, there would not be undue preference, because those payments were not made in favour of certain creditors as against others, but were made in the hope that if he were to keep himself alive something might turn up in his favour." So, also, if the security is given in pursuance of a former promise which has been acted on by the creditor, and which the debtor was ready to fulfil (*e*), or in reference to an actual undertaking which the debtor has given, and which he is peremptorily called on to fulfil (*f*), there is no fraudulent preference. Nor is there fraudulent preference if the case made out is merely the ordinary transactions between a banker and his customer, when the banker advances money to his customer for the purpose of carrying on his business (*g*).

Though the case may not be within the Act if the payment is made with a view to prefer the particular creditor and with some additional motive, the additional motive must not be so trifling that it ought not to be taken into account (*h*). A mere request for payment, though often repeated and refused but ultimately complied with, will not alone prevent a preference on the eve of bankruptcy from being fraudulent (*i*).

(*b*) *Bills v. Smith*, 6 B. & S. 321.

(*f*) *Bills v. Smith*, 6 B. & S. 321.

(*c*) *Ib.*; *Ex parte Blackburn*, 12 Eq. 353; *Ex parte Kewan*, 9 Ch. 758.

(*g*) *Ex parte Hodykin*, 20 Eq. 753.

(*h*) *Ex parte Griffith*, *Times*, 16 February, 1883, *per* Jessel, M. R.

(*d*) 3 App. Ca. 235.

(*i*) *Ib.*, 74 L. T. 297, W. N.

(*e*) *Ex parte Hodykin*, 20 Eq. 755.

(1883), 26.

The knowledge of the creditor preferred or his privity to the circumstances is not to be taken into consideration in estimating whether a transaction is or is not a fraudulent preference. If it appear that a demand was made by the creditor, it is immaterial that he may have been aware of the insolvency of the debtor (*k*). However desperate the circumstances of the debtor may be, and although the creditor knew them to be desperate, the creditor is not debarred from pressing his debtor for payment or to give him a security, and if he did so press and payment was made or a security given, such payment or the giving of such security, though on the very eve of insolvency, is not a fraudulent preference (*l*). But to prevent the payment from being a fraudulent preference, there must be a real pressure (*m*). If what has taken place merely amounts to a request on the part of the creditor for preference, it is not enough (*n*).

A creditor who receives notice of his debtor's intention to commit an act of bankruptcy is not bound to inquire whether the act has been committed, but is entitled to avail himself of his remedies just as if he had received no such notice (*o*). If the Court is satisfied that everything has been done *bond fide*, the transaction cannot be impeached; the case, however, would be different if the matter had originated with the debtor, and was voluntary on his part (*p*).

The proviso in the 92nd section of the Act in favour of a purchaser, payee, or incumbrancer in good faith and for valuable consideration, extends to cases where the consideration is the payment of a pre-existing debt (*q*). A voluntary payment *bond fide* made to a creditor in the usual course of business a few days before the debtor stopped payment, but without notice by the creditor of the debtor's insolvency, has been held to be a payment within the proviso (*r*). So, also, a *bond fide* purchase by a creditor of part of his debtor's property in satisfaction of

(*k*) *Davison v. Robinson*, 3 Jur. N. S. 791.

(*l*) *Ex parte Topham*, 8 Ch. 619; *Smith v. Pilgrim*, 2 Ch. D. 127.

(*m*) *Ex parte Hall*, 19 Ch. D. 580.

(*n*) *Ex parte Griffith*, Times, 16 February, 1883.

(*o*) *Re Wright*, 3 Ch. D. 70.

(*p*) *Ib*.

(*q*) *Ex parte Norton*, 16 Eq. 408.

(*r*) *Ex parte Blackburn*, 12 Eq. 358; *Butcher v. Stead*, 7 E. & I. App. Ca. 839; *Ex parte Kevan*, 9 Ch. 758.

his debt was held to be protected by the proviso (s) ; and it has been laid down generally that a payment in the ordinary course of trade, the procuring of bills of exchange presented at maturity on the payment of debts which have become payable in the customary manner, or payments made in fulfilment of a contract or engagement to pay in a particular manner or at a particular time, are not open to any objection on the ground of their being voluntary, even although they were made without any express demand by the creditor, unless the creditor had at the time notice of an act of bankruptcy committed by the debtor (t).

But if the creditor who receives the payment was clearly aware that he who made the payment was unable to pay his debts from his own money as they became due, and that the money was given to him for the very purpose of preferring him to the general body of creditors, he is not a payee in good faith (u). So, also, if the transaction is fraudulent in its inception, and the creditor has been privy to the fraud, it is immaterial that the payment to the creditor has been made under pressure, for he is not a payee in good faith (x). So, also, a security given by an insolvent company for payment of a debt due to a director cognizant of the state of the company's affairs, was set aside under the Companies Act, 1882, sect. 164, though the director had pressed for the payment of his debt (y). So, also, was a bill of sale given under pressure in pursuance of a prior verbal promise made at the time of an advance, but with the understanding that the security should not be called for unless the debtor was in difficulties (z).

The provisions of the 92nd clause only apply to transactions between a debtor and persons who are in the strict sense of the word his creditors (a). The clause does not apply to trust property (b), or to property appropriated to a particular

(s) *Ex parte Tempest*, 6 Ch. 74.

(t) *Ex parte Blackburn*, 12 Eq. 358.

(u) *Tomkins v. Saffery*, 3 App. Ca. 235 ; *Ex parte Griffith*, Times, 16 February, 1883.

(x) *Ex parte Reader*, 20 Eq. 765. See *Ex parte Kewan*, 9 Ch. 758.

(y) *Gaslight Improvement Co. v. Terrell*, 10 Eq. 168.

(z) *Ex parte Bolland*, 8 Ch. D. 230.

(a) *Ex parte Kelly & Co.*, 11 Ch. D. 306.

(b) *Sinclair v. Wilson*, 20 Beav. 324 ; *Murray v. Pinkett*, 12 Cl. & Fin. 764.

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purpose (c), or to property restored to some one to whom it rightfully belongs, and from whom it was wrongfully taken (d).

In order to protect a transaction from being a fraudulent preference, it is not necessary that the debt should be actually due (e). But the person demanding payment on a security must be some one having a right to make the demand (f). A demand by a surety is sufficient (g).

If the time has passed within which the deed can be set aside as a fraudulent preference, it cannot be treated as void under the bankrupt law (h).

Assignment for
benefit of
creditors.

An assignment by a man of his property for the benefit of his creditors is valid at common law, and under the Statute 13 Eliz. c. 5, and will be supported, provided the deed be *bonâ fide* for the benefit of all the creditors, and there be an unconditional surrender by the debtor of all his property and effects (i). The deed is valid, although it may have the effect of hindering and delaying a particular creditor of his execution, because it does not deprive any of the creditors of his fair share of the debtors' property, if he chooses to become a party to the deed (j). But if the deed is not such a deed as it was reasonable to expect a creditor to become a party to, it cannot be supported (k). So, also, a deed which the debtor has a power to revoke and attempts to use as a shield against his creditors is fraudulent and void against creditors who are affected by the deed, notwithstanding the deed upon the face of it purports to be for the benefit of all the creditors (l). So, also, is an instrument void as against creditors, if there is a secret bargain between the debtor and the trustees that part of the estate shall be kept back (m). So, also, a deed was held void as

(c) 1 D. & J. 152. See *Ex parte* 321.

Kelly & Co., 11 Ch. D. 306.

(d) *Ex parte Stubbins*, 17 Ch. D.

58.

(e) *Strachan v. Barton*, 11 Exch.

647.

(f) *Ib.*

(g) *Edwards v. Glynn*, 2 El. & El.

29.

(h) *Ex parte Games*, 12 Ch. D.

(i) *Smith v. Hurst*, 10 Ha. 30 ;

Riches v. Evans, 9 C. & P. 641.

(j) *Pickstock v. Lyster*, 3 M. & S.

371.

(k) *Owen v. Body*, 5 A. & E. 28.

(l) *Smith v. Hurst*, 10 Ha. 30.

(m) *Blacklock v. Dobie*, 1 C. P. D.

265.

against creditors, which contained a proviso that a dividend should only be paid to a creditor on his assenting to or executing the deed, and that if within a certain time any creditor did not execute or assent, his dividend should be paid by the trustees to the debtor, and which also provided that the executing and assenting creditors should indemnify the trustees against any personal risk or loss they might sustain by reason of their proceedings under the deed (*n*).

Nor can a debtor vest his property in one of his creditors for the mere purpose of protecting himself against the claims of his other creditors. A deed executed for such a purpose cannot be otherwise than fraudulent and void against the creditors, whose interests are affected by it. Such a deed, although upon the face of it for the benefit of the creditors, is in truth a deed for the benefit of the debtor, and the creditor who accepts it takes, not for his own benefit, but for the purpose of carrying out the views and objects of the debtor in fraud of his other creditors. He becomes a party to the fraud of the debtor, and being a party to the fraud, he cannot be in any better position than the debtor who perpetrated it (*o*).

An assignment by a trader of all his effects to a trustee for the general benefit of all his creditors is valid, though it contains a clause empowering the trustee to employ the grantor or any other person or persons in winding up the affairs of the grantor, and in collecting and getting in his estate and effects thereby assigned, and in carrying on his trade, if thought expedient by him, if it appear from the whole scope of the deed that the carrying on the trade was merely subsidiary to the general purpose of sale and distribution (*p*).

Where a debtor in insolvent circumstances executed a deed by which he conveyed all his estate to trustees in trust to sell in such a manner as they might think proper, and to divide the residue of the proceeds after paying expenses rateably, among the creditors, parties to the deed, and if the trustees thought fit,

(*n*) *Spencer v. Slater*, 4 Q. B. D.
13.

(*p*) *James v. Whitbread*, 11 C. B.
406.

(*o*) *Smith v. Hurst*, 10 Ha. 45.

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creditors who refused or neglected to execute, and if the trustees thought proper but not otherwise, to pay the dividends or debts due to non-assenting creditors to the debtor; and the deed also provided for the payment of maintenance to the debtor, if the trustees thought fit, and the executing creditors respectively indemnified the debtor and the trustees in respect of the bills of exchange and promissory notes made or indorsed to them respectively by the debtor, in respect of the scheduled debts, the deed was held good under the statute (q).

The distinction between deeds vesting property in trustees upon trust for the benefit of particular persons, which deeds cannot be revoked, altered, or modified by the party who has created the trust, and deeds purporting to be executed for the benefit of creditors, when the question whether the trusts can be revoked, altered, or modified, depends on the circumstances of each particular case, has been laid down as follows viz.: In cases of deeds vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered, or modified by the party who has created the trust; but in cases of deeds purporting to be executed for the benefit of creditors, the question whether the trusts can be revoked, altered, or modified depends on the circumstances of each particular case. It is difficult at first sight to see the distinction between the two classes of cases, for in each of the classes a trust is created, and the property is vested in the trustees. The distinction lies in this—In cases of trust for the benefit of particular persons, the party making the trust can have no other object than to benefit the persons in whose favour the trust is created, and the trust being well created, the property belongs in equity to the *cestui que trust* as much as it would belong to them at law, if the legal interest had been transferred to them; but in cases of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, the motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience, and the Court has to examine the circumstances for

(q) *Boldero v. London & Westminster Discount Co.*, 5 Exch. D. 50.

the purpose of ascertaining what was the true purpose of the deed, and this examination does not stop with the deed, but must be carried on to what has subsequently occurred, because the party who has created the trust may, by his own conduct or by the obligations which he has permitted his trustee to contract, have created an equity against himself. Each case of the latter description is governed by its own circumstances (*r*).

Another case of fraud upon creditors is where at the time bills of exchange were drawn and accepted, the drawer and acceptor were both intending to become bankrupts, and the drawer sold the bills at a great undervalue to a third party. The Court being satisfied that the holder of the bills knew that the bills were issued in contemplation of bankruptcy, and that there was something wrong about the bills, held that he could not prove in the bankruptcy for more than he had paid for the bills (*s*).

Fraud in drawing and accepting bills in contemplation of bankruptcy

Another case of fraud upon creditors is where upon a composition by a debtor with his creditors, particular creditors, by means of secret bargains, secure to themselves undue advantages over the rest of the creditors. The principle of all composition deeds being that the debtor shall make a true representation of his assets, and that the creditors shall stand upon an equal footing, any secret arrangement between the debtor and a particular creditor, whereby he is placed in a more favoured position than the rest of the creditors, is a fraud upon the others, which will entitle them to set aside the composition and resort to their original debts (*t*), and the debtor may recover back any sum so paid (*u*). The validity of the composition, however, will not be affected by a compulsory payment to a creditor under legal proceedings known to be pending at the time of the arrangement for composition (*x*).

Fraud in composition deeds.

(*r*) *Smith v. Hurst*, 10 Ha. 47.

(*s*) *Jones v. Gordon*, 2 App. Ca. 632.

(*t*) *Cullingprood v. Lloyd*, 2 Beav. 385; *Wood v. Barker*, 1 Eq. 139; *Ex parte Cowen*, 2 Ch. 563; *Dau-lish v. Tennant*, L. R. 2 Q. B. 49;

McKewan v. Sanderson, 15 Eq. 235, 20 Eq. 69; *Re Lenzberg's Policy*, 7 Ch. D. 650.

(*u*) *Smith v. Cuff*, 6 M. & S. 160.

(*x*) *Carey v. Barrett*, 4 C. P. D. 379.

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A creditor who has bargained for a secret advantage of this sort will be bound by a release contained in the deed, although it be void as against the other creditors (*y*). Indeed, it would seem that a creditor who has practised a fraud of this sort on the other creditors will not, if the composition is not paid and the debtor becomes bankrupt, be allowed to prove under the bankruptcy for either his original debt or the composition (*z*).

For the like reasons any agreement made by an insolvent debtor with his assignee, by which the estate of the insolvent is to be held in trust by the assignee to secure certain benefits for himself and his family, such as to pay certain annuities to himself and his wife out of the rents or proceeds of the property assigned, and to apply the surplus to the extinction of debt due to the assignee, is void as being a contrivance in fraud of creditors (*a*).

A creditor, however, holding a security for his own debt, may stipulate to have the benefit of it in addition to the amount of the composition offered by a debtor to his creditors, but he must hold himself entirely aloof from the other creditors, or distinctly communicate with them on the subject, if he at all acts in common with them (*b*).

Composition
under the
Bankruptcy
Act, 1869,
Sect. 28.

By sect. 28 of the Bankruptcy Act, 1869, the creditors may under certain specified conditions accept a composition offered by the bankrupt, or assent to a general scheme of arrangement of his affairs, and the adjudication of bankruptcy may thereupon be annulled. But where after an adjudication in bankruptcy has been so annulled, it is afterwards discovered that the bankrupt has concealed an interest to which he was entitled, the annulling order will be discharged, and the creditors remitted to their original rights (*c*).

Sect. 126.

By sect. 126 of the Bankruptcy Act, 1869, the creditors of a debtor may without any proceedings in bankruptcy, if certain conditions therein specified be complied with, agree by resolu-

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| (<i>y</i>) <i>Ex parte Oliver</i> , 4 Deg. & Sm. | 228. |
| 354. See <i>Atkinson v. Denby</i> , 7 H. | (<i>b</i>) <i>Cullingworth v. Lloyd</i> , 2 Bear. |
| & N. 934. | 385. |
| (<i>z</i>) <i>Re Cross</i> , 4 Deg. & Sm. 364. | (<i>c</i>) <i>Ex parte Jarvis</i> , 10 Ch. D. |
| (<i>a</i>) <i>McNeill v. Cahill</i> , 2 Bligh, | 179. |

tions to accept a composition in satisfaction of the debts due to them.

The power, however, given by the clause enabling the majority of creditors to bind the non-assenting minority, must be exercised *bonâ fide* for the benefit of all the creditors. It is necessary, in order to make a deed of this description binding, that it should be free from all taint of fraud. If there is a fraudulent bargain for the benefit of some creditors, or if the majority of creditors are induced by friendly feelings towards the debtor to accept a composition greatly disproportioned to the assets, the Court will hold the deed not binding on the non-assenting creditors. But if the assenting majority appear to have exercised their discretion *bonâ fide* for the benefit of the creditors, the Court will not review the *quantum* of the composition (*d*). There is fraud upon the clause, if a man having no assets professes to assign all his property to fictitious creditors (*e*).

After composition under the clause, the debtor cannot, before the completion in accordance with the resolutions, enter into a valid agreement with one of the creditors who is bound by the resolutions to pay him his debt in full, even though the creditor at the same time agrees to give the debtor fresh credit (*f*).

There is no rule in bankruptcy that a man cannot have his affairs liquidated by arrangement because he has no assets, if some third party will guarantee the payment of a reasonable composition. A sum of one shilling in the pound, if offered by a third party, is not *per se* evidence of want of *bona fides*. If one shilling in the pound is more than the assets, but some third party gives security for such an amount, the composition may be accepted (*g*).

The Court may decline to register resolutions for a composition, not because the assets are small, but from unsatisfactory

(*d*) *Ex parte Cowen*, 2 Ch. 563 ; N. S. 675.
Ex parte Cobb, 8 Ch. 728 ; *Re Page*, (e) *Re Clunn*, 3 D. J. & S. 236,
 2 Ch. D. 325 ; *Re Terrell*, 4 Ch. D. (f) *Ex parte Barror*, 18 Ch. D.
 296 ; *Ex parte Best*, 18 Ch. D. 488 ; 464.
Ex parte Williams, ib. 495 ; *Ex parte* (g) *Ex parte Hudson*, W. N.
Russell, W. N. (1883), 16, 47 L. T. (1883), 12, 47 L. T. N. S. 674.

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Bankruptcy Act,
1869, ss. 125,
127.
Liquidation by
arrangement.

statements made by the debtor, and the absence of particulars as to items of the assets (*h*).

The Bankruptcy Act, 1869, ss. 125, 127, contain provisions for the liquidation without arrangement of an insolvent debtor's affairs, and the acceptance of a composition by means of registered resolutions without a deed. The Court has jurisdiction to inquire and decide whether fraud has been committed in the registration of such resolutions (*i*). If the facts of the case are such as to satisfy the Court that the resolutions have not been passed *bonâ fide* for the purpose of the administration and distribution of the debtor's assets, but have been come to for the sole purpose of giving the debtor his discharge earlier and upon easier terms than in a bankruptcy, and without exposing him to the consequences of bankruptcy, the resolutions will not be upheld (*k*). But if the proceedings appear to have been *bonâ fide*, and do not show on their face any fraudulent abuse of the power of the majority of the creditors, the resolutions will be upheld (*l*).

Bankruptcy Act,
1869, sect. 34.

The Bankruptcy Act, 1869, sect. 34, preserves to a landlord, in the event of the tenant's bankruptcy, the right of distress for a year's rent of the demised premises. The clause applies to attornment clauses in a mortgage deed when there is nothing unreasonable in the deed itself, or in the rent reserved (*m*). But if from the terms of the particular deed, or from the amount of the rent fixed by the attornment clause, it can be concluded by the Court that the rent is not a real rent, but a mere sham, that the tenancy is not a real tenancy, but a mere sham, and that the attornment clause is a mere device to give the mortgagee a hold in the event of bankruptcy over the goods and chattels of the mortgagor, which would otherwise have been distributed among his general creditors, the attornment clause is invalid (*n*).

(*h*) *Re Lloyd*, W. N. (1883), 10.

(*i*) *Eyre v. Smith*, 2 C. P. D. 435.

(*k*) *Ex parte Hope*, 9 Ch. D. 408.

(*l*) *Ex parte Early*, 13 Ch. D. 300;
Ex parte Matthews, 16 Ch. D. 654.

(*m*) *Re Stockton Iron Furnace Co.*,

10 Ch. D. 335; *Ex parte Voisey*, 21

Ch. D. 452. See *Ex parte Isherwood*,

22 Ch. D. 385.

(*n*) *Ex parte Jackson*, 14 Ch. D.
745.

If property be granted to a man defeasible on his bankruptcy the grant is good, if made by a person other than the bankrupt, and if the condition is express(o). But the law is clearly settled that no man possessed of property can reserve that property to himself, until he shall become bankrupt, and then provide that in the event of bankruptcy it shall pass to another, and not to his creditors (p). A covenant or bond by a man to pay monies upon the contingency of his bankruptcy, even though given in consideration of marriage, is a fraud upon the bankrupt laws and cannot be upheld (q), except as far as the value of the wife's fortune may extend (r). If the Court can find a definite sum which can be appropriated as the wife's property, the covenant will to that extent be supported (s). The fortune of a wife may be settled on her husband till he shall become bankrupt or make a composition with his creditors, and then to her separate use (t).

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Grant defeasible
on bankruptcy.

The same policy of affording protection to the rights of creditors pervades the provisions of the statute 11 Geo. IV. and 1 Will. IV. c. 47, respecting fraudulent devises in fraud of creditors (u); but the statute does not reach conveyances, whether voluntary or not, which the debtor may make in his lifetime (x). A debtor may alienate the land notwithstanding the existence of debts, or he may by will make it equitable assets, or he may devise it for the payment of a particular debt on simple contract, and so withdraw it from specialty creditors

Fraudulent
devises.

(o) *Roe v. Galliers*, 2 T. R. 133; *Doe v. Beran*, 3 M. & S. 353; *Dommett v. Bedford*, 3 Ves. 149, 6 T. R. 684; *Seymour v. Lucas*, 29 L. J. Ch. 841; *Ex parte Eyre*, 44 L. T. N. S. 922.

(p) *Higinbotham v. Holme*, 19 Ves. 88; *Higginson v. Kelly*, 1 Ba. & Be. 255; *Re Casey's Trusts*, 4 Ir. Ch. 247; *Whitmore v. Mason*, 2 J. & H. 212; *Re Pearson*, 3 Ch. D. 808; *Ex parte Jay*, 14 Ch. D. 19.

(q) *Ex parte Hill*, 1 Cox. 300; *Ex parte Cooke*, 8 Ves. 353; *Ex parte Murphy*, 1 Sch. & Lef. 48; *Higin-*

botham v. Holme, 19 Ves. 88; *Higginson v. Kelly*, 1 Ba. & Be. 255.

(r) *Higginson v. Kelly*, 1 Ba. & Be. 255; *Lester v. Garland*, 5 Sim. 205; *Whitmore v. Mason*, 2 J. & H. 204.

(s) *Ib.*

(t) *Lester v. Garland*, 5 Sim. 222; *Sharp v. Cosserat*, 20 Beav. 470.

(u) See Jeremy on Eq. Jur. bk. 3, pt. 2, c. 3, s. 4, pp. 415, 416. See also *Coope v. Cresswell*, 2 Ch. 112; *British Mutual Investment Co. v. Smart*, 10 Ch. 570.

(x) 1 Fonb. Eq. b. 1, c. 4, s. 14 n.

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altogether. The creditors may by taking proceedings obtain payment out of the descended or devised real estates in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, whether upon a common purchase or on a settlement, even with notice that there are debts unpaid, the land is not liable although the heir remains personally liable to the extent of the value of the land alienated (*y*). The alienee, however, may be restrained at the suit of creditors from parting with the money (*z*).

SECTION II.—VOLUNTARY CONVEYANCES IN FRAUD OF SUBSEQUENT PURCHASERS.

Sect. 2.

Another class of frauds upon third parties is that of voluntary conveyances of real estate in regard to subsequent purchasers. The 27 Eliz. c. 4, perpetuated by 39 Eliz. c. 18, s. 31, enacts that every conveyance, grant, charge, lease, estate, and limitation of use of, in or out of lands, tenements, or other hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons, bodies politic, &c., as shall purchase the said lands, &c., or any rent, profit, or commodity in or out of the same, shall be deemed and taken only against that person or persons, bodies politic, &c., and his or their heirs, successors, executors, administrators, and assigns, and against every one lawfully claiming under those who shall so purchase for money or any good consideration the said lands, &c., or any rent, &c., to be wholly void and of no effect (*a*). Courts of Equity had jurisdiction in the matter long before the statute. The Act has not defeated the jurisdiction, but only gives a more clear

(*y*) *Spackman v. Timbrell*, 8 Sim. 217.
253; *Richardson v. Horton*, 7 Beav. 112, 123; *Dilkes v. Broadmead*, 2 D. F. & J. 566. But see *Pimm v. Insall*, 1 Mac. & G. 449.

(*z*) *Green v. Loves*, 3 Bro. C. C.

(*a*) The statute applies only to interests in land, but the words of the statute include all interests in land whether corporeal or incorporeal.

and distinct jurisdiction, and a more extended remedy (*b*). A voluntary conveyance is by the Statute void as against a subsequent purchaser, although it may have been *bonâ fide* and for good consideration, and although the purchaser may have had full notice of the voluntary conveyance. The Statute in every such case infers fraud, and will not allow the presumption to be rebutted (*c*). "The principle," said Lord Campbell, "upon which voluntary conveyances have been held uniformly to be fraudulent and void, as against subsequent purchasers for value, appears to be, that by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, and shows his intention to sell, as that it shall be taken conclusively against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser" (*d*). "Conveyances," said Chief Justice Cockburn, "whether with or without notice, in favour of relations, however honest and otherwise praiseworthy, or even a provision for a man's wife and children, however sacred in a moral point of view the duty of making such a provision may be, are bad as against a subsequent purchaser, as without consideration and voluntary" (*e*). A voluntary conveyance will not be supported against a subsequent purchaser, even although it may have been made by the direction of the Court (*f*).

In order that a subsequent conveyance for value should defeat a prior voluntary conveyance it is essential that both conveyances should be made by the same person. An heir or devisee cannot by a conveyance for value defeat a voluntary settlement made by his ancestor or testator (*g*); but a settlement "really fraudulent or fraudulently kept on foot" (*h*) would

(*b*) See *Perry-Herrick v. Attwood*, 870.
2 D. & J. 21; *Cracknull v. Johnson*,
11 Ch. D. 1.

(*c*) *Doe v. Manning*, 9 East, 59;
Buckle v. Mitchell, 18 Ves. 110;
Bayspoole v. Collins, 6 Ch. 232.

(*d*) *Doe v. Rusham*, 17 Q. B. 724.

(*e*) *Clarke v. Wright*, 6 H. & N.

(*f*) *Martin v. Martin*, 2 R. & M.
507.

(*g*) *Parker v. Carter*, 4 Ha. 409;
Doe v. Rusham, 17 Q. B. 723; *Lewis*
v. Rees, 3 K. & J. 132.

(*h*) Sug. V. & P. 713; Dart, V. &
P. 902.

seem to be void against a *bond fide* purchaser, even from the heir or devisee of the settlor (*i*).

A contract to sell the settled estate to a person with full notice of the voluntary settlement will be enforced at the suit of the purchaser (*k*), but the seller cannot, except under very special circumstances (*l*), compel a specific performance of the contract (*m*). The court will at the instance of the purchaser lend its assistance, but not against him. If the purchaser has paid a deposit he may sue for a recovery of it on the ground that a sufficient title has not been made out (*n*).

A trust created by a voluntary settlement will be carried into execution until sale; but an injunction will not be granted restraining the settlor from defeating the settlement by a sale (*o*), nor will the pendency of a suit prevent the settlor from selling the property or the purchaser from bringing an action to enforce his rights under the contract (*p*).

As between the parties themselves and as against other voluntary grantees of the same estate, voluntary conveyances are binding (*q*). A voluntary settlement will be defeated by a conveyance or settlement for value only to the extent necessary to give effect to the conveyance or settlement for value (*r*). The Statute leaves all those who are interested under the voluntary settlement in exactly the same position in which they were originally placed when the settlement was executed, except that they are displaced to the extent to which the subsequent conveyance displaces them (*s*). As between two volunteers the conveyance which is prior in date will prevail if it be *bond*

(*i*) *Burrell's Case*, 6 Rep. 72. See Exch. 313

Warburton v. Loveland, 2 Dow. & Cl. 497.

(*k*) *Buckle v. Mitchell*, 18 Ves. 100; *Currie v. Nind*, 1 M. & C. 17; *Willats v. Bushby*, 5 Beav. 193; *Lister v. Turner*, 5 Ha. 291; *Rosher v. Williams*, 20 Eq. 217.

(*l*) *Peter v. Nicolls*, 11 Eq. 391.

(*m*) *Smith v. Garland*, 2 Mer. 123; *Johnson v. Legard*, T. & R. 281.

(*n*) *Clarke v. Willott*, L. R. 7

(*o*) *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

(*p*) *Metcalfe v. Pulvertoft*, 1 V. & B. 180, Sug. V. & P. 721.

(*q*) *Bill v. Cureton*, 2 M. & K. 503; *Doe v. Rusham*, 17 Q. B. 723; *Lewis v. Rees*, 3 K. & J. 132.

(*r*) *Croker v. Martin*, 1 Bligh, N. S. 573.

(*s*) *Dolphin v. Aylward*, 4 E. & I. App. Ca. 499.

fide (t). A subsequent volunteer cannot by selling for value confer any title on a purchaser as against a grantee of the same estate who is prior in date (u).

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Conveyances, however, made upon good consideration and *bonâ fide* are by the third section excepted from the operation of the Statute, and by the words "good consideration" is meant valuable consideration (x).

Sect. 3.
Exception of
conveyances
made for
valuable
consideration
and *bonâ fide*.

Though a deed or settlement may appear on its face to be voluntary, evidence is admissible to prove that it was made for valuable consideration, but the evidence must be consistent with the terms of the deed or settlement, and not in contradiction to it, and it must be proved beyond the shadow of a doubt that there was that additional consideration which the parties did not choose to put upon the face of the instrument (y). If the deed be *bonâ fide*, and it appears that a valuable consideration has been given, the *quantum* of such consideration is of no consequence under the Statute. It is enough that any consideration whatever was paid or given or any benefit rendered by the donee to the donor (z). Inadequacy of consideration is only material where it amounts to evidence that the conveyance was not *bonâ fide* but merely colourable for the purpose of getting rid of a prior voluntary settlement (a).

Where the deed or settlement is in the nature of a family arrangement the amount of the consideration is even of less importance than in ordinary cases (b). In a case where an agreement was entered into between a lady, entitled in fee to an estate subject to mortgages, and her nephew that she should come and live with him, and that he should remove into a larger house, and he covenanted to indemnify her from all liability in respect of the mortgages and fulfilled his own part of the agreement, it was held that the settlement was not volun-

(t) *Doe v. Rusham*, 17 Q. B. 723 ;
Lewis v. Rees, 3 K. & J. 132.

(u) *Ib.*

(x) *Supra*, p. 184.

(y) *Kelson v. Kelson*, 10 Ha. 305 ;
Townend v. Toker, 1 Ch. 459 ; *Lery v.*
Creighton, 22 W. R. 605, *supra*, p.
191.

(z) *Bayspool v. Collins*, 6 Ch. 232 ;
Rosher v. Williams, 20 Eq. 217 ;
Price v. Jenkins, 5 Ch. D. 621, *supra*,
p. 197.

(a) *Doe v. James*, 16 East, 212.
See *Owen v. Owen*, 3 H. & C. 88.

(b) *Supra*, p. 197 ; *Lery v. Creigh-*
ton, 22 W. R. 605.

tary, the covenant to indemnify and the expenses incurred by the nephew on the faith of the settlement being sufficient to support it as made for value (*c*). So also it was held in *Bayspoole v. Collins* (*cc*) that a consideration, though merely by way of loan secured by a promissory note, was sufficient to support such a settlement (*d*).

As the fraud under the Statute is more purely statutory and constructive than under 13 Eliz. c. 5, the Court will be disposed to uphold the validity of conveyances against purchasers upon slighter grounds than those which are necessary against creditors.

The proviso in sect. 3, excepting from the operation of the Statute conveyances made *bonâ fide* and for valuable consideration, applies to cases where a man purchases from a person who has obtained a conveyance by fraud of which, however, he had no notice (*e*). Nor will the Court interfere in favour of a subsequent purchaser, when the voluntary grantee has conveyed to a *bonâ fide* purchaser for value or a person has intermarried with the voluntary grantee on the faith of the voluntary deed before the *bonâ fide* purchaser from the voluntary grantee acquired his title (*f*).

If the execution of a voluntary deed be not communicated to the party benefited, there cannot be a question of consideration (*g*).

A purchaser cannot, however, avail himself of the provisions of the Statute so as to displace a prior voluntary conveyance unless the transaction be a *bonâ fide* purchase (*h*). A voluntary deed will not be avoided by a subsequent conveyance apparently made for value, but in fact voluntary and a mere trick for the purpose of invalidating the prior voluntary

Purchase must
be *bonâ fide*.

(*c*) *Townend v. Toker*, 1 Ch. 459.

(*cc*) 6 Ch. 232.

(*d*) See further, as to what will constitute valuable consideration under the statute, *supra*, pp. 184—191.

(*e*) *Doe v. Martyr*, 1 B. & P. N. R. 332.

(*f*) *Producers v. Langham*, 1 Sid.

133; *George v. Milbank*, 9 Ves. 193, Sug. V. & P. 720, *supra*, p. 191.

(*g*) *Jones v. Bygott*, 44 L. J. Ch. 487; *Cracknall v. Janson*, 11 Ch. D. 1, *supra*, p. 191.

(*h*) *Doe v. Routledge*, Cowp. 712; *Humphreys v. Pensam*, 1 M. & C. 580.

deed (*i*). It is not sufficient that the deed should be one which as between the parties was intended to have effect and operation. Although there may be an intention that the grantee shall have the property, yet, if the real transaction be one of bounty for the carrying out of which the form of a conveyance for value is resorted to, the matter is not a *bond fide* purchase or indeed a purchase at all. On the contrary its representation as a purchase for value for the purpose of defeating a prior conveyance which would be unaffected by the new dealing according to its true nature would be a fraud. Evidence, therefore, is admissible to disprove the considerations or one of the considerations of the deed, even although there may be other considerations sufficient, as a matter of construction, to prevent the deed being voluntary (*k*).

A deed is not *bond fide* within the meaning of the Statute which the grantor secretly makes and keeps at his own disposition. In a case accordingly where a man being indebted to his step-daughter secretly made a mortgage of land in her favour, but kept it secret and did not communicate the execution of it to her, and retained the deed at his own disposition, and afterwards, concealing the execution of the mortgage, got an advance of money or forbearance by conveying the estate either by way of mortgage or sale to other parties and covenanted against incumbrances, the mortgage was held void against the subsequent purchaser (*l*).

In *Jones v. Bygott* (*m*) a solicitor mortgaged property A. to a client, retaining the deeds in his own possession. He then fraudulently deposited the deeds by way of equitable mortgage with another person, and on the same day executed a demise of property B. by way of further securing the sum due to his client on property A. The demise was never communicated to the client, but remained in the solicitor's possession until his death. Some years afterwards the solicitor executed a legal mortgage of property B. to third persons. It was held that the demise

(*i*) *Doe v. James*, 16 East, 212; (*l*) *Cracknull v. Janson*, 11 Ch. Roberts v. Williams, 4 Ha. 130. D. 1.

(*k*) *Mullins v. Guilfoyle*, 2 L. R. (*m*) 44 L. J. Ch. 487.
I. 113.

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Who are pur-
chasers within
the statute
27 Eliz. c. 4.

of property B. was voluntary, and was avoided under Statute 27 Eliz. c. 4, by the subsequent mortgage in fee.

A legal mortgagee is a purchaser within the Statute (*n*). So also, is an equitable mortgagee by deposit with memorandum of an agreement for a legal mortgage (*o*). So, also a lessee at rack-rent (*p*) is within the Statute, but not a lessee without fine or rent (*q*). So, also, a purchaser under an ante-nuptial settlement (*r*), or one who, in consideration of the conveyance waives a disputed right (*s*); but a registered judgment creditor is not a purchaser within the meaning of the Statute (*t*). "A purchaser," said Lord Cranworth, "in the sense in which the word is used in the Statute, is one who gives money or valuable consideration in order to have the land" (*u*).

Whether a conveyance by a man to trustees to sell for the benefit of creditors will constitute the trustees purchasers within the meaning of the Statute, is still an unsettled question. In *Barton v. Vanheythuysen* (*x*), Lord Hatherley, then a Vice-Chancellor, held that a general mortgage by a man for the benefit of his creditors of all his real and personal estate was sufficient under the Statute to defeat a prior voluntary settlement, but the question was said by Lord St. Leonards to require further consideration (*y*).

Sect. 4.
Power of
revocation.

The 4th section of the Statute enacts that, if any person shall make any conveyance of lands with a clause of revocation at his will and pleasure of such conveyance, and, after such conveyance shall bargain, sell, grant, demise, convey, or charge the same lands to any person or persons for money or other good consideration, the said first conveyance not being revoked, that the

(*n*) *Doe v. Webber*, 1 A. & E. 733 ;
Chapman v. Emery, Cowp. 279 ;
Dolphin v. Aylward, 4 E. & I. App. 499.

(*o*) *Lister v. Turner*, 5 Ha. 281 ;
Ede v. Knowles, 2 Y. & C. C. C. 172.

(*p*) *Goodright v. Moses*, 2 Bl. 1019.

(*q*) *Upton v. Bassett*, cited in
Twyne's Case, 3 Co. Rep. 80.

(*r*) *Douglas v. Ward*, 1 Ch. Ca.
99 ; *Kirk v. Clark*, Prec. Ch. 275.

(*s*) *Hill v. Bishop of Exeter*, 2
Taunt. 69. See further, *supra*, pp.
184—190, as to what will constitute a
purchase for value.

(*t*) *Beavan v. Lord Oxford*, 6 D.
M. & G. 507. See *Dolphin v. Ayl-*
ward, 4 E. & I. App. 499.

(*u*) 6 D. M. & G. 517.

(*x*) 11 Ha. 131.

(*y*) Sug. V. & P. 713 ; May on
Fraud, Conv. 216—225.

said first conveyance as against such bargainees, vendees, lessees, their heirs, successors, executors, administrators, and assigns, shall be void and of none effect. "The section," said Lord Justice Turner, "provides that if there be a voluntary settlement made with a proviso of revocation, and a charge be afterwards created, the creation of that charge shall avoid the voluntary settlement, as if the power of revocation contained in the settlement had been actually exercised" (z).

The section seems to comprise all settlements, though made for valuable consideration (a), which reserve what is either expressly or virtually a power of revocation to the settlor—e.g., a power to lease for any number of years (b), or an unlimited power to charge by way of mortgage (c), or a power to revoke with the consent of a person nominated by the settlor, or under the control of the settlor (d), or simply at a future date (e)—but a power to charge a reasonable specified sum (f), or to revoke upon terms which are fairly calculated to preserve the substantial rights of the parties entitled under the limitations (g) seem to be unobjectionable. Lord St. Leonards expresses an opinion that where a settlement contains a power of revocation which is afterwards released for valuable consideration, a purchaser, buying subsequently to such release, would be postponed to the settlement. The result probably would be the same, although there was no consideration for the release if the purchaser had notice of it, but a secret release will not affect the purchaser (h).

When a voluntary settlement of lands is avoided by a subsequent sale for valuable consideration, the volunteers have no equity against the purchase-money, payable to the settlor. The whole thing is destroyed as soon as the property is sold, and is

Application of
purchase money,
when settlement
set aside.

(z) *Beavan v. Lord Oxford*, 6 D. M. & G. 528.

(a) See Sug. V. & P. 721; *Smith v. Hurst*, 10 Ha. 30.

(b) *Lavender v. Blackstone*, 2 Lev. 146.

(c) *Tarback v. Marbury*, 2 Vern. 510.

(d) *Twyne's Case*, 3 Rep. 80; *Buller v. Waterhouse*, 2 Show. 46.

(e) *Twyne's Case*, 3 Rep. 80.

(f) *Jenkins v. Keymis*, 1 Lev. 150.

(g) See *Doe v. Martin*, 4 T. R. 39, Sug. V. & P. 721.

(h) Sug. V. & P. 722.

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the same as if the voluntary conveyance had never been made (*i*). Where, however, a voluntary settlement of freeholds, which the settlor subsequently mortgaged, contained a covenant for quiet enjoyment, it was held that the persons claiming under the settlement were entitled to prove on the covenant against the settled estate (*k*). In the same case the subsequent mortgage comprised other lands besides those settled, and it was held that the volunteers might throw the mortgage primarily on the unsettled property (*l*).

Personal chattels
not within
statute.

The 27 Eliz. c. 4 does not apply to personal chattels, so that a voluntary settlement of personal chattels is valid as against subsequent purchasers (*m*).

How far Court
will interfere
actively against
a volunteer.

A purchaser for value cannot come into Court to have a prior voluntary deed, void under Stat. 27 Eliz. c. 4, delivered up to be cancelled. The Court in such a case leaves both parties to their legal rights and remedies (*n*); nor will the Court interfere actively against a volunteer through the medium of a person (not a purchaser for value) claiming only through him who has created the voluntary settlement (*o*).

SECTION III.—CONSTRUCTIVE NOTICE.

Sect. 3.

Another class of frauds upon third parties consists of cases where a man takes or purchases property with notice of the legal or equitable title of other persons to the same property, and seeks to defeat their just rights by appropriating the property to his own use. In equity notice affects the conscience. A man who takes or purchases property cannot protect himself against claims of which he has notice, to the same property. If a man acquiring property has at the time of the acquisition notice of an equity binding the person from whom he takes, in respect of the property, he is bound to the same extent and in the same

(*i*) *Daking v. Whimper*, 26 Beav. 503; *Barton v. Vanheythuysen*, 11 Ha. 126.
568. See *Toker v. Torneud*, 1 Ch. 461.

(*k*) *Hales v. Cor*, 1 N. R. 344.

(*l*) *Ib.*

(*m*) *Jones v. Croucher*, 1 Sim. & St. 315; *Bill v. Churton*, 2 M. & K.

(*n*) *De Hoghton v. Money*, 35 Beav. 98.

(*o*) *Dolphin v. Aylward*, 4 E. & I. App. Ca. 486.

manner by the same equity (*p*). In accordance with this principle the purchaser of property from a trustee, with notice of the trust, is himself a trustee for the same property (*q*); the purchaser of property which the vendor has contracted to sell is, if he has notice of the contract, bound by the same equity by which the vendor whom he represents was bound (*r*); the purchaser of property with notice of an equitable lien for unpaid purchase-money (*s*), or of an equitable mortgage by deposit of deeds (*t*), is bound by the equity to which his vendor was liable; and the purchaser of land which the vendor has covenanted to use in a specified manner is, if he has notice of the covenant, bound by its terms (*u*).

It must, however, be observed that the notice required by the doctrine is notice of an equity, which, if clothed with legal completeness, would be indefeasible, and not merely notice of a defeasible legal interest, or of an interest which, if legal, would be defeasible. The principle is, that an interest which, if legal, would be indefeasible shall not be defeated by reason of its equitable character by a party who has notice of it; if, being legal, it may be defeated at law, there is no equity to support it (*x*). A voluntary conveyance, for instance, has no equity to support it against a subsequent alienation for value, even though with notice, for the right of the volunteer is defeasible by statute (*y*). A feme covert or an infant is just as much bound by notice as an adult (*z*).

Notice is either actual or constructive; but there is no Actual notice. difference between them in its consequences (*a*). Actual

(*p*) *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Dunbar v. Tredennick*, 2 Ba. & Be. 310.

(*q*) *Saunders v. Dehew*, 2 Vern. 271; *Allen v. Knight*, 5 Ha. 272, 11 Jur. 527; *Cory v. Eyre*, 1 D. J. & S. 149; *Mumford v. Stohwasser*, 18 Eq. 556.

(*r*) *Taylor v. Stibbert*, 2 Ves. Jur. 438; *Scott v. Dunbar*, 1 Moll. 442; *Field v. Boland*, 1 Dr. & Wal. 37. See *Dowell v. Dew*, 1 Y. & C. C. C. 345.

(*s*) *Macreth v. Symons*, 15 Ves. 350; *Rice v. Rice*, 2 Drew. 73.

(*t*) *Plumb v. Fluit*, 2 Anst. 432; *Hiern v. Mill*, 13 Ves. 114; *Dryden v. Frost*, 3 M. & C. 670; *Leigh v. Lloyd*, 2 D. J. & S. 330.

(*u*) *Tulk v. Moxhay*, 2 Ph. 774; *Coles v. Sims*, 5 D. M. & G. 1; *De Mattos v. Gibson*, 4 D. & J. 282.

(*x*) *Adams' Doct. Equity*, 152.

(*y*) *Pulvertoft v. Pulvertoft*, 18 Ves. 92; *Buckle v. Mitchell*, ib. 100.

(*z*) *Jones v. Kearney*, 1 Dr. & War. 166.

(*a*) *Sheldon v. Cor*, 2 Eden, 224; *Prosser v. Rice*, 28 Beav. 68; *Horwood v. Maitland*, 25 L. J. Ch. 69.

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notice consists in express information of a fact, and brings home knowledge directly to a party (*aa*). Actual notice must, in order to be binding, at least when it depends on oral communication only, proceed from some one interested in the property (*b*), and should be in the same transaction. Mere vague rumours, or the assertions of strangers, will not fix a party with actual notice (*bb*). Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest evidence from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion (*c*). If there be knowledge the case of constructive notice cannot arise, it would be absorbed in the proof of knowledge (*d*). There is, however, no conclusive rule of law that, because a man has the means of knowledge, he has the knowledge itself. The mere means of knowledge is not the same thing as knowledge. The possession of the means of knowledge is only evidence that the party who has it may have knowledge (*e*).

Constructive
notice.

Whatever is notice enough to excite the attention of a man of ordinary prudence and call for further inquiry is, in equity, notice of all facts to the knowledge of which an inquiry suggested by such notice, and prosecuted with due and reasonable diligence, would have led (*f*). Notice of this sort is called constructive notice. Constructive notice, as distinguished from actual notice is a legal inference from established facts, and

(*aa*) 45 & 46 Vict. c. 39, s. 3.

(*b*) *Barnhardt v. Greenshields*, 9 Moo. P. C. C. 18. See *Greenslade v. Dare*, 20 Beav. 284; *Jay v. Richardson*, 30 Beav. 563.

(*bb*) Sug. V. & P. 755. See *Greenslade v. Dare*, 20 Beav. 284; *Central Railway Co. of Venezuela v. Kisch*, 2 E. & I. App. Ca. 112; *Hamilton v. Royse*, 2 Sch. & Lef. 315.

(*c*) See *Boursot v. Savays*, 2 Eq. 134.

(*d*) *Wilde v. Gibson*, 1 H. L. 624, per Lord Cottenham.

(*e*) *Brownlie v. Campbell*, 5 App. Ca. 952, per Lord Blackburn. See *Earl Beauchamp v. Winn*, 6 E. & I. App. Ca. 233, per Lord Chelmsford.

(*f*) *Maitland v. Backhouse*, 17 L. J. Ch. 121; *Espey v. Lake*, 10 Ha. 260; *Mangles v. Dixon*, 3 H. L. 702; *Owen v. Homan*, 4 H. L. 997; *Davieson v. Prince*, 2 D. & J. 41; *Perry v. Holl*, 2 D. F. & J. 38; *Broadbent v. Barlow*, 3 D. F. & J. 570; *Dettmar v. Metropolitan and Provincial Bank*, 1 H. & M. 641; *Tabor v. Cunningham*, 24 W. R. 156.

like other legal presumptions, does not admit of dispute (*g*). If a man has actual notice of circumstances sufficient to put a man of ordinary prudence on inquiry as to a particular point, the knowledge which he might, by the exercise of reasonable diligence, have obtained will be imputed to him by the Court. The presumption of the existence of knowledge is so strong that it cannot be allowed to be rebutted (*h*).

There is, however, no constructive notice, unless it clearly appear that the inquiry suggested by the facts known or discovered would, if fairly pursued, result in the discovery. There must appear to be in the nature of the case such a connection between the fact discovered and the further facts to be discovered that the former may be said to furnish a clue—a reasonable and natural clue—to the latter (*i*).

The doctrine of constructive notice applies with peculiar force where the Court is satisfied that a man has designedly abstained from inquiry for the very purpose of avoiding knowledge. Wilful ignorance is not to be distinguished, in its equitable consequences, from actual knowledge (*k*). If, however, a man abstain from inquiry where inquiry ought to have been made, it is immaterial that the neglect to make inquiry may not have proceeded from any wish to avoid knowledge. It may be that inquiry might not have brought out the truth; but a man who abstains from inquiry where inquiry ought to have been made, cannot be heard to say so and to rely on his ignorance (*l*). In the absence of inquiry, where inquiry ought to have been made, the Court is bound to assume that the person from whom inquiry should have been made would have done what it was

(*g*) *Williamson v. Brown*, 1 Smith (Amer.), 359, *per* Selden, J.; *Birdsall v. Russell*, 2 Tiff. (Amer.), 249.

(*h*) *Plumb v. Fluit*, 2 Anst. 438, *per* C. B. Eyre; *Hewitt v. Loosemore*, 9 Ha. 455, *per* Turner, L. J.; *Espin v. Pemberton*, 3 D. & J. 554, *per* Lord Chelmsford; *Jones v. Gordon*, 2 App. Ca. 632.

(*i*) *Birdsall v. Russell*, 2 Tiff. (Amer.), 250.

(*k*) *Jones v. Smith*, 1 Ha. 55, 1 Ph.

244; *Owen v. Homan*, 4 H. L. 997, 1035; *Jones v. Gordon*, 2 App. Ca. 632; *Kettlewell v. Watson*, 21 Ch. D. 706.

(*l*) *Jones v. Smith*, 1 Ha. 43; *West v. Reid*, 2 Ha. 249; *Maitland v. Backhouse*, 17 L. J. Ch. 121; *Jones v. Williams*, 24 Beav. 47; *Mayor of Berwick v. Murray*, 7 D. M. & G. 497; *General Steam Navigation Co. v. Rolt*, 6 C. B. N. S. 550. See *Far-rant v. Blachford*, 1 D. J. & S. 107.

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his duty to do (*m*). A man cannot escape being fixed with constructive notice by not using the ordinary caution of employing a solicitor to protect his interest. If a man employs no solicitor he will be held to have exactly the same knowledge, and will be liable to the same extent as if he had employed a solicitor (*n*).

If mere want of caution, as distinguished from gross and culpable negligence is all that can be imputed to a man, the doctrine of constructive notice will not apply (*o*). The doctrine does not go to the extent of fixing a man with such knowledge as he might by the exercise of extreme and extraordinary caution have obtained. A man is in no case bound to use every exertion to obtain information. The want, indeed, of that caution which a wary and prudent man might, and probably would have adopted, is not such negligence as will affix a party with notice of what he might have ascertained (*p*). The means of knowledge by which a man will be affected with notice must be means of knowledge which are practically within reach, and of which a reasonable man or a man of ordinary prudence might have been expected to avail himself (*q*). A recent statute enacts that a purchaser, lessee, or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person who for valuable consideration takes or deals for the property, shall not be prejudicially affected by notice of any instrument, fact, or thing unless it would have come to his knowledge, if such inquiries

(*m*) *Knight v. Bowyer*, 2 D. & J. 450.

(*n*) *Kennedy v. Green*, 3 M. & K. 699; *Harrison v. Guest*, 6 D. M. & G. 428, 8 H. L. 481.

(*o*) *Jones v. Smith*, 1 Ha. 55; *West v. Reid*, 2 Ha. 249, 259; *Ware v. Egmont*, 4 D. M. & G. 460; *Wilson v. Hart*, 2 H. & M. 551. See *Dodds v. Hills*, ib. 426.

(*p*) *Hill v. Simpson*, 7 Ves. 169; *Whitbread v. Jordan*, 1 Y. & C. 317; *Jones v. Smith*, 1 Ph. 257; *West v. Reid*, 2 Ha. 250; *Ware v. Egmont*, 4 D. M. & G. 460; *Re National Life*

Insurance and Investment Association, 31 L. J. Ch. 828; *Hunter v. Walters*, 7 Ch. 85.

(*q*) *Jackson v. Rowe*, 2 Sim. & St. 472; *Broadbent v. Barlow*, 3 D. F. & J. 570; *Att.-Gen. v. Biphosphated Guano Co.*, 11 Ch. D. 337; *Jones v. Rimmer*, 14 Ch. D. 589; *Henderson v. Comptoir d'Escompte de Paris*, L. R. 5 P. C. 262. It is the duty of a purchaser by marriage to make inquiries just as much as it is the duty of other purchasers for value. *Jackson v. Rowe*, 2 Sim. & St. 472.

and inspections had been made as ought reasonably to have been made by him (*r*). Mere suspicion, or vague and indeterminate rumour is not sufficient to put a man upon inquiry (*s*). There must be a reasonable certainty as to time, place, circumstances, or persons (*t*). The question is not whether a man had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross and culpable negligence (*u*). Negligence supposes a disregard of some act known to a man which at least indicates the existence of that fact, notice of which the Court imputes to him (*x*). There is often much difficulty in drawing the line between the degree of negligence, which shall be gross negligence, and that mere want of caution which, in the absence of fraud, does not amount to negligence in the legal sense of the term. No general rule can be laid down which shall govern all cases. Each case must depend on its own circumstances (*y*).

"I must not part with the case," said Lord Cranworth, in *Ware v. Lord Egmout* (*z*), "without expressing my concurrence in what has on many occasions of late years fallen from judges of great eminence on the subject of constructive notice, that it is highly inexpedient to extend the doctrine—to attempt to apply it to cases to which it has not hitherto been held applicable. When a person has actual notice of any state of facts, there can be no danger of injustice if he is held to be

(*r*) 45 & 46 Vict. c. 39, s. 3 (1).

(*s*) *Whitfield v. Fausset*, 1 Ves. 392; *Hine v. Dodd*, 2 Atk. 275; *New Sombiero Phosphate Co. v. Erlanger*, 5 Ch. D. 117. See *Central Railway Co. of Venezuela v. Kisch*, 2 E. & I. App. Ca. 112.

(*t*) Story, Eq. Jur. 400; *General Steam Navigation Co. v. Rolt*, 6 C. B. N. S. 550. See *Blacklow v. Laws*, 2 Ha. 48.

(*u*) *Ware v. Egmout*, 4 D. M. & G. 460; *Montefiore v. Browne*, 7 H. L. 241. See *Borrell v. Dunn*, 2 Ha. 446; *Greenslade v. Dave*, 20 Beav.

284; *Tildesley v. Lodge*, 3 Sm. & G. 543; *Re National Life Assurance and Investment Association*, 31 L. J. Ch. 828.

(*v*) *West v. Reid*, 2 Ha. 249, 259. See *Greenslade v. Dave*, 20 Beav. 284.

(*y*) *Jones v. Smith*, 1 Ha. 55; *West v. Reid*, 2 Ha. 249; *Ware v. Egmout*, 4 D. M. & G. 460; *Colyer v. Finch*, 5 H. L. 905; *Perry-Herrick v. Attwood*, 2 D. & J. 21; *Dixon v. Muckleston*, 8 Ch. 160. See as to negligence, *supra*, pp. 115—117.

(*z*) 4 D. M. & G. 473.

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bound by all the consequences of what he knows to exist. But when he has not actual notice he ought not to be treated as if he had, unless the circumstances of the case are such as to enable the Court to say not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in conducting the business in question (*a*).

If a man has actual notice that the property in question is in fact charged, encumbered, or in some way affected, or has actual notice of facts raising a presumption that it is so, he is bound in equity, with constructive notice of all facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstances affecting the property of which he had actual notice (*b*).

Where, accordingly a man has notice, whether by recital, description of parties, or otherwise, of an instrument, which from its nature must form directly or presumptively a link in the title, or is told at the time that it does so, he will be presumed to have examined it, and therefore to have notice of all instruments or facts to which an examination would have led him (*c*).

Notice of a deed
is notice of its
contents.

A purchaser, accordingly, who has actual notice of a deed, is bound by all its contents (*d*), and has notice of all equities springing out of the deed (*e*), and of all instruments to which

(*a*) See *Armstrong v. Lynn*, 1 R. 9 Eq. 195.

(*b*) 1 Ha. 55, *per* Wigram, V.-C., 7 H. L. 262, *per* Lord Chelmsford. See *Downes v. Power*, 2 Ba. & Be. 493; *Grant v. Campbell*, 6 Dow. 239; *Neesom v. Clarkson*, 2 Ha. 163; *West v. Reid*, *ib.* 249; *Att.-Gen. v. Flint*, 4 Ha. 147; *Frail v. Ellis*, 16 Beav. 350; *Re Bright's Trusts*, 21 Beav. 430; *Coles v. Sims*, 5 D. M. & G. 1; *Welchman v. Coventry Union Bank*, 8 W. R. 729; *Jay v. Richardson*, 30 Beav. 563; *Cox v. Coventon*, 31 Beav. 388; *Locke v. Prescott*, 32 Beav. 261; *Leigh v. Lloyd*, 2 D. J. & S. 330; *McBryde v. Eykyn*, 25 L. T. N. S. 192.

(*c*) *Jones v. Smith*, 1 Ph. 253;

West v. Reid, 2 Ha. 249; *Putman v. Harland*, 17 Ch. D. 353. See *Plumb v. Fluit*, 2 Anst. 432; *Palmer v. Wheeler*, 2 Ba. & Be. 31; *Eyre v. Dolphin*, *ib.* 290; *Malpas v. Ackland*, 3 Russ. 273; *Roddy v. Williams*, 3 J. & L. 1; *Steadman v. Poole*, 16 L. J. Ch. 349; *Cox v. Coventon*, 31 Beav. 378; *Clements v. Welles*, 1 Eq. 200; *Shaw v. Foster*, 5 E. & I. App. Ca. 336.

(*d*) *Tanner v. Florence*, 1 Ch. Ca. 259; *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Neesom v. Clarkson*, 2 Ha. 173.

(*e*) *Hamilton v. Royse*, 2 Sch. & Lef. 326; but see Lf. & G. 264, *per* Lord St. Leonards, Sug. V. & P. 777.

an examination of the deed would have led him (*f*); even although such instruments are not actually recited, but there is only a recital that the property is subject to limitations which in fact correspond with the limitations thereby created (*g*). If the deed under which he takes title be a settlement, he takes with notice of all equities springing out of the settlement (*h*). Notice of a post-nuptial and apparently voluntary settlement agreement is notice of the ante-nuptial settlement on which it is founded (*i*). So, also, notice of an equitable claim as affecting an unspecified portion of the property is notice of the claim as in fact affecting the entirety (*k*). If the deed under which he takes title shows that there are incumbrances affecting the property to which the deed relates, he takes with notice of all such incumbrances (*l*). In *Peto v. Hammond* (*m*), the purchaser of land from the allottees of a building society, who had not inquired for the conveyance of the land to the trustees of the society, was held bound not only by the notice of the deed, but also by what would have certainly been told him, if he had inquired for the deed, namely, that the deed had been retained by the party who had sold the land to the trustees, as an equitable mortgage, with a covenant from the trustees to convey the legal estate to him, if required. So, also, it has been held that notice of a prior conveyance and of the then vendor's title is notice of his lien for unpaid purchase-mones (*n*). So, also, an inaccurate recital of a will has been held notice of its real contents (*o*). So, also, if a man purchases from a seller whose conveyance was "subject to all the mortgages and charges affecting the same," he will be bound by a prior deposit of the deeds relating to a portion of the estate of which he had not notice, although there were other charges of which he was informed, which satisfied the word, "mortgages and charges" (*p*).

(*f*) *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Bisco v. Earl of Bambury*, 1 Ch. Ca. 287, 291; *Tanner v. Florence*, ib. 259, 260; *Davies v. Thomas*, 2 Y. & C. 234.

(*g*) *Neesom v. Clarkson*, 2 Ha. 163.

(*h*) *Hamilton v. Royse*, 2 Sch. & Lef. 326.

(*i*) *Ferrars v. Cherry*, 2 Vern. 384.

(*k*) *Att.-Gen. v. Flint*, 4 Ha. 147.

(*l*) *Montefiore v. Browne*, 7 H. L. 241; but see *Sug. V. & P.* 777.

(*m*) 30 Beav. 495.

(*n*) *Davies v. Thomas*, 2 Y. & C. 234.

(*o*) *Hope v. Liddell*, 21 Beav. 183.

(*p*) *Jones v. Williams*, 24 Beav. 47.

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A prospectus, however, of a company, mentioning an Act of Parliament, in which Act a deed of settlement is recited, is not of itself sufficient to fix any person reading the prospectus with constructive notice of the contents of the deed. To hold that he was, would be carrying the doctrine of constructive notice too far (*q*).

Notice of a lease
is notice of all
its contents.

So, also, notice of a lease is notice of all its contents (*r*). If a purchaser has notice that property is held under a lease, he cannot object that he had no notice of any particular covenant therein contained (*s*). The omission on the part of the vendor to state unusual covenants in the particulars of sale does not affect the title (*t*), nor is it a misrepresentation, although the value of the premises may be lessened by such covenants (*u*). In a case where the conditions of sale were silent as to the nature of the covenants, and required that the purchaser should covenant with the vendor for the performance of the covenants and conditions in the lease, a covenant in the lease against carrying on certain specified trades, "or any other noisome or offensive trade," was held to be no objection to the title (*x*). So, also, a clause against alienation without the lessor's consent was held to be no objection in the lease of a house, at least in or near London (*y*).

A man who wishes to protect himself against unusual or particular covenants should before purchasing inquire into the covenants and stipulations of the original lease, so as to know precisely the terms on which the property is held (*z*). If there

(*q*) *Re National Assurance Association, Abercorn's Case*, 4 D. F. & J. 111.

(*r*) *Hall v. Smith*, 14 Ves. 426; *Walter v. Maunde*, 1 J. & W. 181; *Smith v. Capron*, 7 Ha. 191; *Dawes v. Betts*, 12 Jur. 709; *Lewis v. Bond*, 18 Beav. 85; *Parker v. White*, 1 H. & M. 167; *Clements v. Welles*, 1 Eq. 200; *Fielden v. Slater*, 7 Eq. 523; but see *Martin v. Cotter*, 3 J. & L. 506, *per* Lord St. Leonards.

(*s*) *Ib.*

(*t*) *Pope v. Garland*, 4 Y. & C.

394.

(*u*) *Spunner v. Walsh*, 10 Ir. Eq. 386, 11 Ir. Eq. 598.

(*x*) *Grosvenor v. Green*, 28 L. J. Ch. 173; *Flood v. Pritchard*, 40 L. T. N. S. 873; *Thornewell v. Johnson*, 50 L. J. Ch. 661.

(*y*) *Strangeways v. Bishop*, 29 L. T. 120.

(*z*) *Pope v. Garland*, 4 Y. & C. 394; *Martin v. Cotter*, 3 J. & L. 506; *Cullen v. O'Meara*, L. R. Ir. 2 C. L. 663; *Wilson v. Hart*, 1 Ch. 463.

be no misrepresentation by the vendor, the purchaser is bound by the contents of the lease (*a*) ; but if there be misrepresentation so that the acuteness and industry of the purchaser is set to sleep, and he is induced to believe the contrary of what is the real state of the case, the vendor is in such case bound by the misrepresentation (*b*). If, for instance, the terms of a particular covenant turn out to be of a much more stringent description than they were represented to be, there is fraud (*c*).

The rule that notice of a lease is notice of its contents applies to the case of sales under a decree as well as to the case of sales out of Court (*d*).

Though notice of a lease is notice of its contents, the Court may, on the application for specific performance, decline to grant specific performance of a lease containing covenants of an unusual nature, if the person against whom the relief is sought had no reasonable means of inspecting the original lease, or knowing its contents (*e*). If, however, he has had reasonable means of inspecting the lease, specific performance will be decreed (*f*), although he may have intended to apply the property to a purpose which, as it turned out, was prohibited (*g*). It is immaterial in such case whether or not the vendor knew the purchaser's intention (*h*).

So, also, and upon the same principle, where a man is of right in possession of corporeal hereditaments, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, and persons so dealing cannot be heard

Notice that a man is in possession of land is notice of his equities therein and thereto.

(*a*) *Pope v. Garland*, 4 Y. & C. 394 ; *Spinner v. Walsh*, 10 Ir. Eq. 400 ; *Wilson v. Hart*, 1 Ch. 463.

(*b*) *Pope v. Garland*, 4 Y. & C. 394.

(*c*) *Flight v. Booth*, 1 Bing. N. C. 377 ; *Van v. Corpe*, 3 M. & K. 269 ; *Cullen v. O'Meara*, Ir. 4 C. L. 538, *supra*, p. 54.

(*d*) *Spinner v. Walsh*, 10 Ir. Eq. 386.

(*e*) *Hanbury v. Litchfield*, 2 M. & K. 629 ; *Flight v. Barton*, 3 M. & K.

282 ; *Nelthorpe v. Holgate*, 1 Coll. 203 ; *Martin v. Cotter*, 3 J. & L. 507 ; *Williams v. Livesey*, 18 Beav. 206 ; *Brunfit v. Morton*, 3 Jur. N. S. 1198 ; *Darlington v. Hamilton*, Kay, 550 ; *Hyde v. Warren*, 3 Exch. D. 80.

(*f*) *Smith v. Capron*, 7 Ha. 191 ; *Flood v. Pritchard*, 40 L. T. N. S. 873.

(*g*) *Morley v. Clavering*, 29 Beav. 84.

(*h*) *Ib.*

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to deny notice of the title under which the possession is held (*i*). Notice, accordingly, that the occupier holds as tenant to A. is notice of A.'s title (*k*). So also notice that the rents are received by A. is notice of A.'s title and of the instrument under which he claims (*l*), and of the character in which he receives them (*m*). So also notice that receipts have been given to and accepted by the vendor for an annual payment as rent, but which the vendor and purchaser claiming under him subsequently contend was in fact a rent-charge, is notice to the purchaser of the payee's title to the freehold (*n*); nor is it necessary that such possession should be continually visible or actively asserted. If a man has once received rightful possession of land, he may go to any distance from it without authorising any servant, or agent, or other person to enter upon it, or look after it, may leave it for years uncultivated and unused, may set no mark of ownership upon it, and his possession may nevertheless continue, at least unless his conduct affords evidence of intentional abandonment. A man who knows, or cannot be heard to deny that he knows, another to be in possession of a certain property, cannot for any civil purpose, as against him at least, be heard to deny having thereby notice of the title or alleged title under which, or in respect of which, the former is or claims to be in that possession (*p*). Where, accordingly, the purchaser of mines took possession under the agreement for purchase, without any conveyance, it was held that a subsequent purchaser of land, without any exception of mines, took with notice of the agreement (*q*).

The rule that if a person is in possession of property, notice of the title under which he is in possession must be attributed

(*i*) *Taylor v. Stibbert*, 2 Ves. Jr. 640.

437; *Crofton v. Ormsby*, 2 Sch. & Lef. 583; *Powell v. Dillon*, 2 Ba. & Be. 416; *Greenwood v. Bairstow*, 5 L. J. Ch. N. S. 179; *Jones v. Smith*, 1 Ha. 60; *Holmes v. Powell*, 8 D. M. & G. 580.

(*k*) *Bailey v. Richardson*, 9 Ha. 734.

(*l*) *Knight v. Bowyer*, 23 Beav.

(*m*) S. C. 2 D. & J. 421.

(*n*) *Att.-Gen. v. Stephens*, 1 K. & J. 750, 6 D. M. & G. 111.

(*p*) *Holmes v. Powell*, 8 D. M. & G. 580; but see *Cavander v. Bulteel*, 9 Ch. 82, *per James*, L. J.

(*q*) *Holmes v. Powell*, 8 D. M. & G. 580.

to every one who deals with that property, applies to cases where a partnership firm is in possession of property. If a partnership firm is in possession of property, a person who deals with one of the parties in respect of that property is put upon inquiry as to the interest of the firm in it. He has notice that the part-owners have made some bargain about it which gives each an interest in the moiety belonging to the other, and he is put upon inquiry what the extent of that interest is (r). If moreover, the title deeds of the property are handed over by way of equitable mortgage by one of the partners to secure a private debt of his own, and the equitable mortgagee has notice that the property is partnership property, the partnership property must as against him be applied in payment of partnership debts whether contracted before or after the security (s).

If there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor v. Stibbert* (t), but also to interests under collateral agreements (u), the principle being the same in both cases, namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound either to inquire what the interest is, or to give effect to it whatever it may be (x). If the tenant has even changed his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title as purchaser (y).

The principle that possession by a tenant of land is notice of the terms of his holding, applies to a case where a man buys property subject to an easement. He is bound by all the

(r) *Cavander v. Bulteel*, 9 Ch. 79.(s) *Ib.*

(t) 2 Ves. Jr. 437.

(u) *Daniels v. Davison*, 16 Ves. 249, 17 Ves. 433; *Allen v. Anthony*, 1 Mer. 282. *Comp. Hughes v. Seanor*, 18 W. R. 1122.(x) *Barnhardt v. Greenshields*, 9*Moo. P. C.* 32; *Knight v. Bowyer*, 2 D. & J. 450; *Mumford v. Stohwasser*, 18 Eq. 556.(y) *Daniels v. Davison*, 16 Ves. 249, 17 Ves. 433; *Crofton v. Ormsby*, 2 Sch. & Lef. 583; *Powell v. Dillon*, 2 Ba. & Be. 416; *Wilbraham v. Livesey*, 18 Beav. 206.

equities which bound his vendors (z). So also when the mortgagee of a burial ground had notice of the purposes to which it was devoted, he was held bound by the right of burial, temporary or in perpetuity, granted by his mortgagor when left in possession (a).

Notice, however, of a past tenancy is not notice of the tenant's equitable interests (b), nor when the vendor is himself the tenant, and has acknowledged payment of the purchase-money both in the body of the conveyance and by the usual endorsed receipt, is the tenancy notice of his lien for any part thereof which may in fact remain unpaid (c). Nor is notice of a tenancy necessarily notice of the tenant's equities as between vendor and purchaser (d). A man who has notice of the occupation of a tenant is not bound to go to the tenant and inquire what is the nature of his tenancy (e). There are some dicta in *James v. Litchfield* (ee), which go nearly to that extent, and which support the notion that the doctrine of *Daniels v. Davison* applies as between vendor and purchaser, and whilst the matter still rests in contract. The doctrine in question refers to equities between the purchaser and the tenant when the legal estate has passed and has nothing to do with the rights and liabilities of vendors and purchasers between themselves. If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser and let him know what it is which is being sold (f). Nor is notice of a tenancy constructive notice of the lessor's title (g). Nor will a *bonâ fide* purchaser, otherwise without notice, be affected by the mere circumstance of the vendor having been out of possession for many years. A purchaser neglecting to inquire into the title of the occupier is not affected by any other equities than those which such occupier may insist

(z) *Hervey v. Smith*, 1 K. & J. 389, 22 Beav. 299.

(a) *Moreland v. Richardson*, 22 Beav. 596.

(b) *Miles v. Langley*, 1 R. & M. 39, 2 R. & M. 626.

(c) *White v. Wakefield*, 7 Sim. 401.

(d) *Nelthorpe v. Holgate*, 1 Coll. 203.

(e) *Caballero v. Henty*, 9 Ch. 447. (ee) 9 Eq. 54.

(f) *Caballero v. Henty*, 9 Ch. 447.

(g) *Jones v. Smith*, 1 Ha. 63, per Wigram, V. C.; *Barnhardt v. Green-shields*, 9 Moo. P. C. 34.

on. If a person equitably entitled to an estate lets it to a tenant who takes possession, and then the person having the legal estate sells to a person who purchases *bonâ fide* and without notice of the equitable claim, the purchaser will hold against the equitable owner, although he had notice of the tenant being in possession (*h*). In all cases the possession relied on has been the actual occupation of the land, and the equity sought to be enforced has been on behalf of the party so in possession (*i*). But it must be remembered that by *the party in occupation* is meant, not merely the person who by himself and his labourers tills the ground, but the person who is known to receive the rents from the person in occupation (*k*). So also notice of the legal estate being outstanding is notice of the trusts on which it is held (*l*); and notice that the title deeds are in the possession of a third party is notice of any charge he has upon the property (*m*). So also notice that the title is a mortgage title seems to be notice of any dealings by the mortgagee with the mortgagor which may have kept alive the equity of redemption (*n*).

So also, and upon the same principle, a person has been held to be affected with notice of a fraud affecting a deed, and which the unusual manner in which it was executed ought to have suggested to his solicitor (*o*). So also if a bill be accepted in blank, and the acceptor was aware of the fact, there is notice of any fraudulent use that may have been made of it (*p*). So also a lessee (*q*), or a sub-lessee, has notice of the title of the immediate and (in the case of a sub-lessee) original lessor (*r*),

Person held to have notice of facts which he ought to have known.

(*h*) *Oxwith v. Plummer*, 2 Vern. 636; *Barnhardt v. Greenshields*, 9 Moo. P. C. 34.

(*i*) *Barnhardt v. Greenshields*, ib.

(*k*) *Knight v. Bowyer*, 23 Beav. 609, 640, 641, 2 D. & J. 421.

(*l*) *Anon.*, 2 Freem. 137.

(*m*) *Hiern v. Mill*, 13 Ves. 122; *Dryden v. Frost*, 3 M. & C. 670; *Maxfield v. Burton*, 17 Eq. 18.

(*n*) See *Hansard v. Hardy*, 18 Ves. 462.

(*o*) *Kennedy v. Green*, 3 M. & K.

699. See *Greenslade v. Dare*, 20 Beav. 291; *Greenfield v. Edwards*, 2 D. J. & S. 582, Sug. V. & P. 776.

(*p*) *Hatch v. Seurles*, 24 L. J. Ch. 22. See *Sharp v. Arbuthnot*, 13 Jur. 219.

(*q*) *Att.-Gen. v. Buckhouse*, 17 Ves. 293; *Butler v. Lord Portarlington*, 1 Dr. & War. 20; *Att.-Gen. v. Hall*, 16 Beav. 388.

(*r*) *Steedman v. Poole*, 6 Ha. 193. See *Cosser v. Collinge*, 3 M. & K. 283.

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and the mere fact that he is precluded by the terms of the contract or by the Vendors and Purchasers Act, 1874, s. 2, from calling for the lessor's title, will not exempt him from the consequences of notice (s). So where a family solicitor, who had prepared a marriage settlement, became the apparent purchaser of the estate under a fictitious exercise of the usual power of sale, and subsequently executed instruments purporting to vest the estate in the husband, and then, as the husband's solicitor, applied for a loan on mortgage, and delivered an abstract of the title as above referred to in the usual way, with his name as solicitor, it was held that the purchaser had implied notice of his having been the solicitor who prepared the settlement, and of the irregularity of the nominal purchase (t). So, a mortgagee, having notice that a bill which formed part of the consideration for the purchase of the estate by the mortgagor remained unpaid, has been held bound to inquire whether the vendor has any lien on the estate, the deed of conveyance leaving the point doubtful (u). So, a purchaser dealing with trustees for sale, at a time or under circumstances suggestive of the probability of the sale being a breach of trust, is bound to inquire and see whether any such breach of trust is in fact being committed (x). So also notice of a deed is not only notice of its contents, but of the facts to a knowledge of which the insisting on its production would have necessarily led (y). So also a man who buys property from an agent, with distinct notice that the party with whom he is dealing is an agent, has cast upon him the liability of sustaining the transaction just as much as the agent himself. If the transaction could not be upheld by the agent, neither could it be supported by a purchaser from that agent, if he deals with him in his character of agent (z).

When, however, a sale by fiduciary vendors is apparently regular, a purchaser need not inquire into collateral questions,

- (s) *Patman v. Harland*, 17 Ch. D. G. 635.
353.
(y) *Peto v. Hammond*, 30 Beav. 495.
(t) *Robinson v. Briggs*, 1 Sm. & G. 495.
188.
(z) *Molony v. Kernan*, 2 Dr. & War. 40.
(u) *Frail v. Ellis*, 16 Beav. 350.
(x) *Stroughill v. Anstey*, 1 D. M. &

such as the mode in which the sale has been conducted (*a*), although he will be affected with notice of a breach of trust clearly deducible from facts appearing on the face of the assurance (*b*), or suggesting enquiry (*c*). Nor, although a purchaser of a lease is bound to know from whom the lessor derived his title, is he affected with notice of all the circumstances under which he so derived it (*d*). Nor, *semble*, is notice of a lease notice of collateral facts mentioned in the lease (*e*). Nor on the purchase of A., one of two adjoining estates belonging to the same owner, is notice of building covenants entered into by such owner with a mortgagee of the adjoining estate B., notice of the expenditure on both estates of money which, under the covenant, ought to have been expended on B. exclusively (*f*). So, also, slight discrepancies in the plans or the deeds which, if enquired into, might have led to the detection of a fraudulent dealing with the property, were held not to be constructive notice of it (*g*).

The possession of a client's deeds by a solicitor is so usual, and so much in the ordinary course of transactions, that where a man purchases an estate and is informed that the deeds are in the hands of the solicitor of the owner of the estate, there is nothing which renders it necessary for him to inquire under what circumstances the solicitor held the deeds (*h*). But if a solicitor acquires by contract a different interest beyond what his character of solicitor confers (such as equitable mortgagee), it is incumbent on him immediately to give clear and distinct notice of such interest to all persons in visible ownership of the estate. Such a case is not within the principle of the cases in which a purchaser of land has been held bound to inquire of the tenant in possession the nature of his interest (*i*).

Possession of
deeds by
solicitor of
vendor is not
notice.

(*a*) See *Borell v. Dann*, 2 Ha. 440, 450. See *Ware v. Egmont*, 4 D. M. & G. 460.

(*b*) See *Att.-Gen. v. Pargeter*, 6 Beav. 150; *Kerr v. Lord Dungannon*, 1 Dr. & War. 509, 542.

(*c*) *Boursot v. Savage*, 2 Eq. 134.

(*d*) *Att.-Gen. v. Backhouse*, 17 Ves. 293.

(*e*) See *Darlington v. Hamilton*,

Kay, 556.

(*f*) *Harryman v. Collins*, 18 Beav. 19.

(*g*) *Hunter v. Walters*, 7 Ch. 75.

(*h*) *Bozon v. Williams*, 3 Y. & J. 150; *Cory v. Eyre*, 1 D. J. & S. 149; *Bradley v. Riches*, 9 Ch. D. 193.

(*i*) *Bozon v. Williams*, 3 Y. & J. 150.

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Omission to
inquire for title
deeds of
property.

The omission of a purchaser of property to inquire after the title deeds is gross negligence, and will affect him with the knowledge which he might have obtained upon inquiry. The possession of the legal estate will not protect a man who has omitted to inquire after the title deeds, or who accepts a frivolous excuse for their non-production against the claim of an innocent party (*k*). The Court will in such a case infer that he has abstained from inquiry in order to deprive himself of knowledge, and that he has wilfully shut his eyes to the facts (*l*). "A purchaser or mortgagee," said Lord Selborne, in *Agra Bank v. Barry* (*m*), "should make inquiries after the title deeds. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest ought, by himself or his solicitor, to follow with a view to his own title and his own security. If he does not follow that course the omission of it may be a thing requiring to be accounted for and explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing to avoid knowledge of the true state of the title. What is a sufficient explanation must always be a question to be decided with reference to the nature and circumstances of each particular case." So also, a man taking from a vendor who has not possession of the deeds, will take with notice of any claim which the party in possession of the title deeds has (*n*). The omission, however, of a purchaser to inquire for the deeds will not affect him with knowledge of fraud committed by the person of whom he was bound to make inquiry (*o*).

Party not fixed
by notice of deed
merely because
he was a witness
to it,

Though notice of a deed is notice of its contents, the mere fact that a man has been witness to the execution of a deed will not of itself fix him with notice of the contents (*p*). Nor is

(*k*) *Worthington v. Morgan*, 16 Sim. 547; *Tylee v. Webb*, 6 Beav. 552; *Allen v. Knight*, 5 Ha. 272, 11 Jur. 527; *Hewitt v. Loosemore*, 9 Ha. 449; *Colyer v. Finch*, 5 H. L. 905; *Perry-Herrick v. Attwood*, 2 D. & J. 21; *Peto v. Hammond*, 30 Beav. 495; *Hopgood v. Ernest*, 3 D. J. & S. 116, *supra*, pp. 112, 113.

(*l*) *Ratcliff v. Barnard*, 6 Ch. 654.

(*m*) 7 E. & I. App. Ca. 157.

(*n*) *Dryden v. Frost*, 3 M. & C. 670. See *Hiern v. Mill*, 13 Ves. 122. Comp. *Bozon v. Williams*, 3 Y. & J. 150, *supra*, pp. 112, 113.

(*o*) *Hipkins v. Amery*, 2 Giff. 292.

(*p*) *Mocatta v. Murgatroyd*, 1 P. Wms. 393; *Beckett v. Cordley*, 1

notice of a will passing all the testator's real estates generally, and not specifically, notice of all the particular estates which the testator had to pass (*g*). Nor if a purchaser has notice only that a draft of the deed is prepared, and not that the deed was executed, would he be bound by notice, although the deed was actually executed; for a purchaser is not to be affected by notice of a deed in contemplation (*r*).

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or because he heard a draft had been prepared.

A mere statement that further information is to be had at the office of a company is not enough to put persons upon inquiry whether statements put forward by directors are true or false (*s*). But if a man, on being specially referred to another for information, neglects to apply to him, he will be held to have notice of what he might have learnt upon inquiry (*t*). So also if a man, having reasonable grounds to suspect the existence of a fact of importance, asks one of the parties to the transaction, who refuses all information, but does not ask other parties, whom he has reason to believe to be able and willing to give him information, his ignorance is wilful (*u*). A party relying on his ignorance of fact must show, not only that he had not the information, but that he could not with diligence have obtained it (*x*).

A mere statement that information may be had at a particular place is not notice.

But if a man be specially referred to another for information, he is fixed with notice, &c.

A man who in dealing for property is told of anything as affecting the property, though incorrectly, cannot rely on what is told him, but is bound to make further inquiry and to ascertain the exact truth (*y*). If he knows that another has or claims an interest in the property, he, in dealing for that property, is bound to inquire what that interest is, although it may be inaccurately described (*z*). If he is told or has notice that a certain instrument affects the property in question in

If a man has notice that property is affected, he is fixed with notice as to the nature of the charge, and cannot rely on the information given to him as to its nature.

Bro. C. C. 357; *Randliffe v. Parkins*, 6 Dow. 149, 222, Sug. V. & P. 751.

(*g*) *Randliffe v. Parkins*, 6 Dow. 149, 222—224.

(*r*) *Cothay v. Sydenham*, 2 Bro. C. C. 391. See *Jones v. Smith*, 1 Ha. 63, 1 Ph. 256.

(*s*) *Smith v. Reese River Co.*, 2 Eq. 269.

(*t*) *Wason v. Waring*, 15 Beav. 151.

(*u*) *Bainbrigge v. Moss*, 3 Jur. N. S. 58.

(*x*) *Wason v. Waring*, 15 Beav. 151.

(*y*) *Wilson v. Hart*, 2 H. & M. 551, 1 Ch. 463. See *Jones v. Smith*, 1 Ph. 255. Comp. *Re Bright's Trust*, 21 Beav. 430.

(*z*) *Gibson v. Ingo*, 6 Ha. 112, 124. See *Att.-Gen. v. Jones*, 2 Jur. 369.

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some particular respect, he will be fixed with notice of its provisions if it should turn out to affect the property in other respects also (*a*). Notice of a charge to an indefinite amount, although the notice be inaccurate as to the particulars or the extent of the charge, is sufficient to put upon inquiry a party dealing for the property subject to the charge; and if the actual charge appear afterwards to be incorrectly described in the notice, it is nevertheless sufficient as a ground for giving priority for the true amount of the charge as against the party who received the incorrect notice but made no inquiry (*b*).

In *Taylor v. Baker* (*c*), a party, at the time of making his purchase, and before it was made, had actual notice that a certain person had a judgment and warrant of attorney which affected the purchased estate. It turned out, however, that he had a mortgage and not a judgment, and the court held that the purchaser, having notice that he had an interest affecting the property, could not ward off the claim to the incumbrance, only because the nature of the claim was different from that which the notice conveyed to him (*d*). The principle was carried further in *Penny v. Watts* (*e*). A man there, who claimed under a marriage settlement as a purchaser without notice, had notice before his marriage that a legatee had given up her legacy under a will in favour of the intended wife, to whom the estate upon which it was charged belonged, and which was comprised in the subsequent marriage settlement; and had also notice that the intended wife had in consequence devised to the legatee a portion of the estate, and that the legatee was dead. This was held by Lord Cottenham to be notice as leading to inquiry of an equitable reversionary title in the husband of the legatee under a subsequent agreement with the lady, the deviser, before her marriage, to convey the devised estate to him. It has, however, been considered by Lord St. Leonards (*f*), and

(*a*) *Taylor v. Baker*, 5 Pri. 306;

Jackson v. Rowe, 2 Sim. & St. 475;

Farrow v. Rees, 4 Beav. 18; *Mitchell*

v. Steward, 35 L. J. Ch. 393. See

Jones v. Smith, 1 Ph. 255

(*b*) *Gibson v. Inge*, 6 Ha. 124.

(*c*) 5 Pri. 306.

(*d*) See *Steadman v. Poole*, 16 L.

J. Ch. 349, 6 Ha. 193.

(*e*) 1 Mac. & G. 150.

(*f*) Sug. V. & P. 766.

in *Abbot v. Gerahty* (*g*), that this case carries the principle too far.

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A purchaser or lessee who has notice of a deed forming part of the chain of title of his vendor or lessor is not protected from the consequences of not looking at the deed even by the most express representations of the vendor or lessor that it contains no restrictive covenants nor anything affecting the title (*h*).

Though a man, who has actual notice that the property in respect of which he is dealing is in fact affected by a particular instrument, is bound to examine that instrument, he is not bound to examine instruments which are not directly or presumptively connected with the title to the property in question, merely because he knows that they exist and may by possibility affect it. If an instrument does not necessarily affect the title, but only may or may not do so according to circumstances, the omission to examine it will not fix a party with gross negligence, if there is no reason to suppose that he may have acted otherwise than fairly in the transaction (*i*). Nor is notice that certain circumstances exist which may by possibility affect the property in dispute sufficient to put a man upon inquiry, if he appear to have acted fairly in the transaction (*k*). A purchaser, for instance, will not be affected by an ambiguous recital (*l*), or by circumstances inducing merely a suspicion of fraud (*m*), or by the usual trust of a term to attend the inheritance, where no reference is made to any particular instrument or course of limitations (*n*); so notice of there being a change of solicitors who are professionally to represent a particular interest, is not, in itself, notice of a change in the owner-

Doctrine of notice does not extend to instruments or circumstances which may only by possibility affect property.

(*g*) 4 Ir. Ch. 23.

(*h*) *Patman v. Harland*, 17 Ch. D. 353.

(*i*) *Kenney v. Browne*, 3 Ridg. P. C. 512; *Jones v. Smith*, 1 Ha. 43, 1 Ph. 254; *West v. Reid*, 2 Ha. 249; *Ware v. Egmout*, 4 D. M. & G. 460; *Harryman v. Collins*, 18 Beav. 11; *Greenslade v. Dare*, 20 Beav. 284; *Re Bright's Trust*, 21 Beav. 430; *Stephenson v. Royse*, 5 Ir. Ch. 401; *Coc v. Coventon*, 31 Beav. 378;

General Steam Navigation Co. v. Rolt, 6 C. B. N. S. 550; *Perry v. Holl*, 2 D. F. & J. 38; *Patman v. Harland*, 17 Ch. D. 353.

(*k*) *Ib.*

(*l*) *Kenney v. Browne*, 3 Ridg. P. C. 512. See 2 Ha. 175.

(*m*) *M'Queen v. Farquhar*, 11 Ves. 482. See *Dodds v. Hills*, 2 H. & M. 426.

(*n*) *Dart*, V. & P. 876.

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ship of such interest (*o*) ; nor is the mere fact of a daughter, soon after coming of age, giving securities to a creditor of her father in payment of his debt, of itself a ground for imputing to the creditor knowledge of undue influence having been exerted over her by her father (*p*). To affect the creditor with notice of undue influence, it is not enough to show that he was aware of the reluctance of the daughter to concur in the security (*q*).

A purchaser of lands with notice that the title deeds have been deposited with a bank as security for the general balance on the vendor's present and future accounts is not bound to enquire whether the bank has after notice of the purchase made fresh advances. The burden lies on the bank advancing on the security of the unpaid vendor's lien to give the purchaser notice that it has so done or intends so to do (*r*).

In *Hervey v. Smith* (*s*), the purchaser of a house to which a wall having fourteen flues or chimneys in it belonged, twelve only, however, of which were used by the house, was held bound by this fact to know that the other two must have been used by his neighbour. But the doctrine of constructive notice was carried too far in that case (*t*). The purchaser of property cannot be held to have constructive notice of every agreement relating to any structure which he sees on the adjoining ground (*u*). Where, accordingly, disputes having arisen between the plaintiff and the owner of an adjoining tenement as to whether a window in the plaintiff's house, overlooking the adjoining tenement, was an ancient window, an agreement, not under seal, was signed by which the owner of the adjoining tenement agreed that the plaintiff should have access of light to the window and the plaintiff agreed to keep the window opaque

(*o*) *West v. Reid*, 2 Ha. 249.

(*p*) *Thorner v. Sheard*, 12 Beav. 589. See *Cobbett v. Brock*, 20 Beav. 524. Comp. *Especy v. Lake*, 10 Ha. 260 ; *Sercombe v. Saunders*, 34 Beav. 382 ; *Berdie v. Dawson*, ib. 603. See *supra*, p. 156.

(*q*) *Rhodes v. Cook*, 4 L. J. Ch. 149, 2 Sim. & St. 488. See *Blackie*

v. Clark, 15 Beav. 595. Comp. *Maitland v. Irving*, 15 Sim. 441.

(*r*) *London & County Banking Co. v. Ratcliffe*, 6 App. Ca. 739, *per* Lord Blackburn.

(*s*) 22 Beav. 299.

(*t*) Sug. V. & P. 765.

(*u*) *Allen v. Seckham*, 11 Ch. D. 790.

and make it open only in such a way that no person could look out of it; and the owner of the adjoining tenement afterwards sold the tenement to the defendant, who had no notice of the agreement but knew of the existence of the window, it was held that the mere fact of there being windows in an adjoining house which overlooked a purchased property is not constructive notice of any agreement giving a right to the access of light to them (v). But if a structure upon land is of such a nature that every reasonable man must know that it affects the property, a purchaser is put upon inquiry as to it and has constructive notice. In *Morland v. Cook* (x), the purchaser saw the property protected by a sea-wall, and the court considered that every reasonable man under the circumstances must be taken to have known that the wall existed for the protection of the lands below the level of the sea, and that there must be some provision made for its maintenance and repair, and that therefore he was put upon inquiry.

So if the condition of the property at the date of the contract is such as to suggest inquiry, the purchaser may be fixed with constructive notice of rights of way, or other easements affecting it. Thus, where A. purchased from B. a house, part of an estate agreed to be let to B. on a building agreement, and the house was built partly over an archway leading to mews in the rear but not then forming the only means of access thereto, it was held that A. had constructive notice that when the building scheme was completed, the road under the archway would be the only approach to the mews, and that a right of way, though not expressly reserved in the assignment to A., was reserved by implication (y).

Nor is a man bound to examine a deed or document which does not form part of the chain of title or does not necessarily from its very nature affect the property in question, if he is told that it does not affect it, and he acts fairly in the transaction, and believes the representation to be true (z). The effect, indeed, of what would otherwise be notice, may be destroyed by

Notice excluded
by distinct
representation.

(v) *Ib.*

(x) 6 Eq. 252.

(y) *Davies v. Scar*, 7 Eq. 427.(z) *Jones v. Smith*, 1 Ha. 43, 1 Ph. 254; *Re Bright's Trust*, 21 Beav. 430.

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misrepresentation. A man to whom a particular and distinct representation is made is entitled to rely on the representation, and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn, and which independently of the representation would have been sufficient to put him upon inquiry (*a*), or, although he is told that further information may be had on the matter by making inquiries from a particular person, or at a particular place (*b*). A man is entitled to rely on the representations of the vendor as to the contents of a deed, and is not bound to examine the deed itself (*c*). So, also, a man who purchases shares in a company on the faith of a prospectus may rely on the statements made therein, and is not bound to ascertain whether they are true (*d*). The mere fact that he may have attended a meeting of the company is not a sufficient ground for fixing him with notice of the falsity of the representations in the prospectus (*e*). Nor will a shareholder in a company be affected with knowledge of the documents referred to in the memorandum, or articles of association of a company, so as to be debarred from complaining of any false or deceptive statements which may have been made as to the contents of those documents (*f*).

If a *bonâ fide* inquiry be made in the proper quarter and a reasonable answer be given, a man may rest satisfied with the information, and need not make any further inquiry (*g*). A man, for instance, who on the purchase of property *bonâ fide*

(*a*) *Van v. Corpe*, 3 M. & K. 269; *Flight v. Barton*, ib. 282; *Pope v. Garland*, 4 Y. & C. 394; *Wilson v. Short*, 6 Ha. 365, 367; *Vignolles v. Bowen*, 12 Ir. Eq. 385; *Cox v. Middleton*, 2 Drew. 209; *Patman v. Harland*, 17 Ch. D. 353, *supra*, pp. 41, 42.

(*b*) *Smith v. Reese River Silver Mining Co.*, 2 Eq. 264.

(*c*) *Grosvenor v. Green*, 28 L. J. Ch. 173; *McCulloch v. Gregory*, 1 K. & J. 286; *Re Bright's Trust*, 21 Beav. 430; *Cox v. Coreuton*, 31 Beav. 378;

Ex parte Briggs, 1 Eq. 483. See *Martin v. Colter*, 3 J. & L. 505.

(*d*) *Smith v. Reese River Silver Mining Co.*, 2 Eq. 264; *Stewart's Case*, 1 Ch. 574.

(*e*) *Stewart's Case*, 1 Ch. 574. See *Webster's Case*, 2 Eq. 741.

(*f*) *Kisch v. Central Venezuela Railway Co.*, 3 D. J. & S. 122.

(*g*) *Jones v. Smith*, 1 Ha. 43; *Bird v. Fox*, 11 Ha. 47; *Jones v. Williams*, 24 Beav. 47; *Dawson v. Prince*, 2 D. & J. 44; *Espin v. Pemberton*, 3 D. & J. 547.

inquires for the title deeds, is not bound to make further inquiry, if a reasonable excuse is made for their not forthcoming (*h*). The omission of the solicitor of a legal mortgagee to require production of deeds when a reasonable excuse is given for their non-production is not of itself a sufficient ground to postpone the legal mortgagee to a prior equitable incumbrancer (*i*). So, also, if deeds are deposited with a man by the other party to the transaction, which purport or are represented to be all the material deeds relating to the estate, and he honestly believes the representation to be true, he is not guilty of gross negligence if he abstains from further inquiry on the subject (*k*). In a case where an equitable mortgagee with whom some of the title deeds of the mortgaged property, including the conveyance to the mortgagor, were deposited, brought an action to establish his priority over a subsequent legal mortgagee whose solicitor had omitted to examine a parcel which was given to him previously to the execution of the mortgage deed and purported to contain all the title deeds but contained only the earlier deeds, it was held that there was not such wilful negligence on the part of the solicitor as to fix the legal mortgagee with constructive notice of the prior charge so as to entitle the equitable mortgagee to enforce in equity his priority over the legal mortgagee (*l*).

“A series of authorities,” said Lord Selborne, in *Dixon v. Muckleston* (*m*), “have decided that when the Court is satisfied of the good faith of the person who has got a prior equitable charge, and is satisfied that there has been a positive statement, honestly believed that he has got the necessary deeds, he is not bound to examine the deeds and is not bound by constructive notice of their actual contents or of any deficiencies which by examination he might have discovered in them. This I take to be the law, even in cases where the depositor of the deeds is him-

(*h*) *Hewitt v. Loosemore*, 9 Ha. 449; *Espin v. Pemberton*, 3 D. & J. 547; *Agra Bank v. Barry*, 7 E. & L. App. Ca. 149, *supra*, p. 112, 113.

(*i*) *Ratcliff v. Barnard*, 6 Ch. 654.

(*k*) *Roberts v. Croft*, 2 D. & J. 1;

Hunt v. Elmes, 2 D. F. & J. 578. Comp. *Bannfather's Claim*, 16 Ch. D. 179.

(*l*) *Ratcliff v. Barnard*, 6 Ch. 654.

(*m*) 8 Ch. 161.

self acting in the double character of borrower of the depositor's money and of solicitor for the depositor. In the cases of *Hunt v. Elmes* and *Hewitt v. Loosemore* the facts were of that character. In *Hunt v. Elmes* and *Colyer v. Finch* the deeds had never been looked at, but credit had simply been given to a statement made, either upon the parcel containing the deeds or otherwise, that they were the proper deeds relating to the estate. In some of these cases the lender was not otherwise advised than by the solicitor of the borrower or by a solicitor having, as mortgagee, a personal contrary interest, and yet the lender was held not to be guilty of such neglect or laches as amounted to what is described by Lord Justice Turner in *Hewitt v. Loosemore* as 'gross and wilful negligence,' which in the eye of this court amounts to fraud, merely because he believed the statements made to him and abstained from examining the deeds and did not employ an independent solicitor." The fact that the person with whom he is dealing and who makes the representation may be his own solicitor is immaterial, if the representation was honestly believed to be true (*n*).

A representation or an answer to an inquiry will not, however, dispense with the necessity of further inquiry, unless it be made by a person upon whose representation the other party is entitled to rely and rest satisfied. The representations of a man bind him as far as his own interest is concerned, but do not bind the interests of other parties, unless he was authorised by them to make the representations. An under-lessee must not rest satisfied with the representations of his lessor, who is also a sub-lessee, as to the covenants in the lease. He must go back to some one who can give him more complete information (*o*). Nor should a man who deals with an agent having a limited authority rest satisfied with his representations as to the extent of his authority, but should refer to the principal for further information (*p*). So, also, a man who accepts a con-

(*n*) *Roberts v. Croft*, 2 D. & J. 1; 167. See *Clements v. Welles*, 1 Eq.
Hunt v. Elmes, 2 D. F. & J. 578. 200.
 See *Perry v. Holl*, ib. 38; *Cory v.* (*p*) *Wilson v. Hart*, 2 H. & M.
Eyre, 1 D. J. & S. 168. 551; 1 Ch. 463.
 (*o*) *Parker v. Whyte*, 1 H. & M.

veyance without any previous investigation, relying on the mere assurances of the vendor that he is absolute owner, will be held to have constructive notice of the title, although he may have acted without any fraudulent intention (*q*). So, also, where a solicitor acting on behalf of a woman before her marriage is told by the intended husband that his title deeds are deposited at his bankers for safe custody, he has constructive notice of any lien the bankers may have on them (*r*).

The effect of what would be otherwise notice may be destroyed, not only by actual misrepresentation, but by mere silence, or by anything calculated to deceive, or even lull suspicion on a particular point (*s*). If the vendor of a lease be informed by the purchaser of his object in buying, and the lease contains covenants which will defeat that object, the silence of the vendor is equivalent to a misrepresentation (*t*). But if the agent of the purchaser has had the opportunity of inspecting the original lease, the vendor need not inform the purchaser of unusual covenants which will prevent him from carrying out his intention (*u*).

Although a man who has been induced to enter into a transaction by misrepresentation might have detected the misrepresentation long before the time he did, he is not bound to make inquiries, until there is something to raise suspicion (*x*).

Constructive notice only operates in cases affecting title. A mere constructive notice of circumstances of negligence in the mode of conducting a sale is entirely collateral to any question of title (*y*).

It is not necessary that notice should be brought home to the party interested himself. It is enough if it is brought

Period from
which notice
dates.

Constructive
notice operates
only in cases
affecting title.

Notice to agent
or solicitor is
sufficient.

(*q*) *Jackson v. Rowe*, 2 Sim. & St. 472, 475. See *Jones v. Smith*, 1 Ph. 255; *Neesom v. Clarkson*, 2 Ha. 173; *West v. Reid*, ib. 260; *Proctor v. Cooper*, 2 Drew. 1, affd. 1 Jur. N. S. 149; *Howard v. Chaffers*, 2 Dr. & Sm. 236.

(*r*) *Maxfield v. Burton*, 17 Eq. 18.

(*s*) *Pope v. Garland*, 4 Y. & C. 394; *Bartlett v. Salmon*, 6 D. M. &

G. 41; *Darlington v. Hamilton*, Kay, 550, *supra*, p. 54, 55.

(*t*) *Flight v. Barton*, 3 M. & K. 282.

(*u*) *Morley v. Clavering*, 29 Beav. 84.

(*x*) *Rawlins v. Wickham*, 3 D. & J. 304.

(*y*) *Borell v. Dann*, 2 Ha. 440.

home to his agent, solicitor, or counsel (*z*). There is no distinction in point of legal effect between personal notice to the party and notice affecting him through the medium of his agent (*a*). Notice to the agent is notice to the principal; for upon general principles of public policy it must be taken for granted that the principal has notice of whatever is communicated to his agent whilst acting as such in the transaction to which the communication relates (*b*), and is fixed with the knowledge of every fact material to the transaction which his agent or solicitor either knows or has imparted to him in the course of his employment, and which it was his duty to communicate, whether it be communicated or not (*c*). The presumption that a solicitor has communicated to his client facts which he ought to have made known to him cannot be rebutted by proof that it was the interest of the solicitor to keep back the fact (*d*). The rule that notice to an agent is notice to the principal applies to cases where the principal is an infant (*e*).

The notice which affects a principal or client through his agent or solicitor is generally treated as constructive notice (*f*); but inasmuch as the principal or client is bound by the notice, whether it be communicated to him or not, and is not presumed to have the knowledge, merely because the circumstances of the case put him on inquiry, such notice may more properly be treated as actual notice, or if it is necessary to make a distinction between the knowledge which a man possesses himself and that which is known to his agent or solicitor, the latter may be called imputed knowledge (*g*).

(*z*) *Archer v. Hudson*, 15 L. J. Ch. 211; *Maxfield v. Burton*, 17 Eq. 18; *Rolland v. Hart*, 6 Ch. 680; *Kettlewell v. Watson*, 21 Ch. D. 685.

(*a*) *Toulmin v. Steere*, 3 Mer. 224; *Vane v. Vane*, 8 Ch. 399.

(*b*) *Sandford v. Handy*, 23 Wend. (Amer.), 268; *Bank of United States v. Davies*, 2 Hill (Amer.), 452.

(*c*) *Roddy v. Williams*, 3 J. & L. 16; *Majoribanks v. Horenden*, Dru. 11; *Espin v. Pemberton*, 3 D. & J. 554; *Wyllie v. Pollen*, 3 D. J. & S.

601; *Boursot v. Savage*, 2 Eq. 134; *Vane v. Vane*, 8 Ch. 399; *Bradley v. Riches*, 9 Ch. D. 193.

(*d*) *Bradley v. Riches*, 9 Ch. D. 193.

(*e*) *Toulmin v. Steere*, 3 Mer. 222.

(*f*) See *Toulmin v. Steere*, 3 Mer. 222.

(*g*) 3 D. & J. 554, per Lord Chelmsford. See *Eyre v. Burmester*, 10 H. L. 103; *Bradley v. Riches*, 9 Ch. D. 193; *Cave v. Cave*, 15 Ch. D. 643.

Notice to an agent, solicitor, or counsel should, in order to bind a principal or client, be notice in the same transaction. A recent statute enacts that a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, agent, or solicitor, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by such solicitor or other agent (*h*). But it is declared by sub-sect. 2 of the same clause that the section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction, contained in any instrument under which his title is derived, either mediately or immediately; and such liability may be enforced in the same manner and to the same extent as if this section had not been enacted.

The rule that notice to an agent or solicitor is notice to a principal or a client applies where the same solicitor or agent is employed by both parties to the transaction (*i*), or is himself the vendor (*k*). The mere circumstance, however, of there being only one solicitor in the business does not necessarily constitute him the solicitor of both parties so as to affect both with notice. It does not follow that if there be not a solicitor employed on both sides, the solicitor who does act is the solicitor of both parties. To have this effect there must be a consent to accept him as such, or something equivalent thereto (*l*).

The mortgagee or purchaser may not desire to employ a

- (*h*) 45 & 46 Viet. c. 39, s. 3 (2).
 (*i*) *Le Neve v. Le Neve*, 3 Atk. 646; *Toulmin v. Steere*, 3 Mer. 210; *Fuller v. Bennett*, 2 Ha. 394; *Dryden v. Frost*, 3 M. & C. 670; *Roddy v. Williams*, 3 J. & L. 16; *Tweedale v. Tweedale*, 23 Beav. 341; *Atterbury v. Wallis*, 8 D. M. & G. 454; *Spaight v. Cowne*, 1 H. & M. 359; *Boursot v. Savage*, 2 Eq. 134; *Bradley v. Riches*, 9 Ch. D. 193.
 (*k*) *Dryden v. Frost*, 3 M. & C. 670; *Marjoribanks v. Horenden*, Dru. 11; *Robinson v. Briggs*, 1 Sm. & G. 188; *Re Rorke's Estate*, 13 Ir. Ch. 371.
 (*l*) *Espin v. Pemberton*, 4 Drew. 333, 3 D. & J. 547; *Wythes v. Labouchere*, 3 D. & J. 594; *Lloyd v. Attwood*, ib. 614; *Perry v. Holl*, 2 D. F. & J. 38. See *Hewitt v. Loosemore*, 9 Ha. 449; *Cobbett v. Brock*, 20 Beav. 524; *Atterbury v. Wallis*, 8 D. M. & G. 454, Sug. V. & P. 772.

solicitor, but if he knowingly constitute the relation of solicitor and client between himself and his vendor or between himself and the solicitor of the party with whom he is dealing, he will of course be affected with notice of any prior incumbrance of which the solicitor is cognizant (*m*), and although a purchaser is not necessarily to be held to have employed his vendor's solicitor because he employed no other, yet if he employs no solicitor he must be held to have exactly the same knowledge as if he had employed one (*n*).

The rule that notice to a solicitor is notice to the client applies only as between parties dealing hostilely with each other (*o*).

It is not every description of knowledge possessed by a solicitor employed in any particular transaction that can be treated as the actual knowledge of the client. All matters affecting the title to property, or the interests of other persons in connection with it, all circumstances which would entitle parties to equitable priorities, or change the character of rights, which depend upon want of notice, if known to the solicitor, have the same effect as if actually known to the client. But this imputed knowledge will not extend to matters which have no reference to rights created or affected by the transaction, but which merely relate to the motives and objects of the parties, or to the consideration upon which the matter is founded (*p*). Nor does the employment of a solicitor to do a mere ministerial act, such as the procuring the execution of a deed or preparing a conveyance, so constitute him an agent as to affect his employer with notice of matters within his knowledge (*q*).

The rule that notice to a solicitor is notice to the client does not apply to a case where trustees and executors are in possession of a fund, and notice of a mortgage or charge on the fund is given to the solicitor employed by them in the matter. Such

(*m*) *Espin v. Pemberton*, 4 Drew. 333, 3 D. & J. 547; *Kettlewell v. Watson*, 21 Ch. D. 685.

(*n*) *Atterbury v. Wallis*, 2 Jur. N. S. 344, 8 D. M. & G. 454, *per* Lord Romilly.

(*o*) *Austin v. Tawney*, 2 Ch. 143.

(*p*) *Per* Lord Chelmsford, 10 H. L. 114.

(*q*) *Wyllie v. Pollen*, 3 D. J. & S. 601; *Kettlewell v. Watson*, 21 Ch. D. 685.

notice is not sufficient to create a privity and to make the trustees or executors liable to the same consequences as if notice had been given to them personally (r).

The rule that notice to a solicitor is notice to the client has been held to apply notwithstanding that the solicitor may be perpetrating a fraud upon the client. But in *Kennedy v. Green* (r), Lord Brougham held that a client is not to be affected with notice of a prior fraud committed by the solicitor, which the latter would of course conceal. A distinction was, however, subsequently made between cases where there was fraud independently of the question whether the act which had been done was made known or not, and cases where the question of fraud depended wholly upon whether the act had been made known or not (s); and in the latter class of cases it was considered that the client had constructive notice. In *Atterbury v. Wallis* (t), for instance, where a solicitor took a mortgage of an equity of redemption, which he sub-mortgaged, and afterwards joined with the first mortgagee and the mortgagor in a new mortgage of the property, acting as the solicitor of all parties to the transaction, but not disclosing the existence of the sub-mortgage, it was held that the new mortgagee was affected with the solicitor's knowledge, and his security was to that extent displaced. So also in *Rolland v. Hart* (u), where a solicitor on behalf of A., one of his clients, procured from B., another client, an advance on a mortgage of land in Middlesex, and then, concealing the incumbrance, induced C., also a client, to lend money on mortgage of the same estate, and C.'s security was the first registered, it was held that the case did not fall within the principle of *Kennedy v. Green*, and that C., having notice through the solicitor of B.'s mortgage, could not gain priority over it by registration. So also in *Boursot v. Savage* (v), where a purchaser employed one of three fiduciary vendors as his solicitor in the transaction, he was fixed with constructive notice of the trust. "The fact," said Kin-

(r) *Saffron Walden, &c., Society v. G.* 466.

Rayner, 14 Ch. D. 406.

(rr) 3 M. & K. 699.

(s) *Hewitt v. Loosemore*, 9 Ha.

449; *Atterbury v. Wallis*, 8 D. M. &

(t) Ib.

(u) 6 Ch. 678.

(v) 2 Eq. 142.

dersley, V.-C. (*x*), "that the solicitor may be committing a fraud in relation to a transaction in which he is employed, cannot afford any reason why the client should not be affected with constructive knowledge of the facts. The constructive knowledge of all the facts must be imputed to him whether there is fraud relating to the transaction or not. It is the existence of the trust, and not of the fraud, of which he is held to have constructive notice. The constructive notice of the trust must be imputed to him whether there is fraud relating to it or not." So also in a case where the plaintiff jointly with his solicitor contributed money on loan on a deposit of deeds, and the solicitor subsequently took a mortgage to himself and deposited the deeds with a bank as security for monies advanced to him, it was held that notice of the plaintiff's advance must be imputed to the bank (*y*). "Where," said Mr. Justice Fry (*z*), "there is an interest and a duty, the Court will not presume that the solicitor will follow his interest and not his duty. If, moreover, the circumstances of the case are looked to, the suggestion that the transaction would have failed if the solicitor had made known to the bank the advance of the plaintiff does not arise. The mortgage was taken by the bank as the best thing it could get."

The tendency of later decisions, however, has been in favour of the doctrine that when a man employs a solicitor, whose whole purpose and meaning in the transaction is to cheat and defraud his client, and who in furtherance of this intention keeps back purposely from his knowledge the true state of the case, the presumption is conclusively repelled that the client has imputed or constructive notice through the solicitor of the fact which has been concealed from him (*a*). "This exception," said Mr. Justice Fry, in *Cave v. Cave* (*b*), "has been put in two ways. In *Rolland v. Hart*, Lord Hatherley put it substantially

(*x*) 2 Eq. 142.

(*y*) *Bradley v. Riches*, 9 Ch. D. 193.

(*z*) *Ib.*

(*a*) *Espin v. Pemberton*, 3 D. & J. 547; *Thompson v. Cartwright*, 33 Beav. 185, 2 D. J. & S. 10; *Hop-*

good v. Ernest, 3 D. J. & S. 116; *Waldy v. Gray*, 20 Eq. 251; *Jones v. Bygott*, 44 L. J. Ch. 487; *Bannfather's Claim*, 16 Ch. D. 178; *Kettlewell v. Watson*, 21 Ch. D. 685.

(*b*) 15 Ch. D. 644.

in this way, that you must look at the circumstances of the case, and inquire whether the Court can see that the solicitor intended a fraud, which would require the suppression of knowledge of the incumbrance from the person upon whom he was committing the fraud (*c*). In *Thompson v. Cartwright*, Lord Romilly puts it differently, and it appears that in his view you must inquire whether there are circumstances in the case, independently of the fact under inquiry, as to raise an incontrovertible conclusion that the notice has not been communicated. In the one view notice is not imputed, because the circumstances are such as not to raise the conclusion of law which does ordinarily arise from the mere existence of notice to the agent; in the other view, that of Lord Hatherley and Lord Chelmsford, in *Espin v. Pemberton*, the act done by him in his character of agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent (*d*). Where, accordingly, a trustee, a solicitor, used trust funds in purchasing an estate which was conveyed to his brother, and afterwards acted as solicitor to his brother, the mortgagor, in raising money on the estate by a legal mortgage, it was held that the legal mortgagee had priority over the *cestuis que trust*, for that the fraud of the solicitor ran through the whole transaction and prevented the imputation of notice. According to *Thompson v. Cartwright*, I am bound to look at the terms of the mortgage in considering whether there was an intention on the part of the solicitor to commit a fraud, and looking at it, the conclusion I had arrived at independently of them is strongly confirmed. The conclusion I have arrived at is that the mortgagee has sustained the burden cast upon him of proving that the circumstances are such as to repel the construction or imputation to the principal of notice to the agent. I hold, therefore, that his mortgage has priority over that of the plaintiffs." "The presumption from duty," said further Mr.

(*c*) See *Sankey v. Alexander*, I. R. 9 Eq. 319.

(*d*) See *Sankey v. Alexander*, I. R. 9 Eq. 317.

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Justice Fry, in *Kettlewell v. Watson* (e), "in the agent may be repelled by showing that whilst he was acting as agent, he was also acting in another character, namely, as a party to a scheme or design of fraud, and that the knowledge he attained was attained by him in the latter character, and therefore there would be no ground to assume that the duty of the agent was performed by a person who filled that double character."

"If," said Bacon, V.-C., in *Waddy v. Gray* (f), "the disclosure of that fact of which knowledge is sought to be fixed upon the client would have imputed fraud to the solicitor, it is not to be presumed that the solicitor did make disclosure of that fact; or if a person employed as a solicitor has done things which if disclosed would prevent the perfection of the security in which he is engaged, which would show that a good title does not exist to that which he is the instrument of conveying to a purchaser, it is not to be expected or inferred that he would communicate what he has done to his client. The suppression of a thing done by a man in direct violation of his duty as trustee is an act which must relieve his client of all imputed knowledge of the transaction upon any theory of notice through a solicitor." Where, accordingly, a trustee of a settlement, being a solicitor, advanced the monies of the trust upon a mortgage of real estate, of which he took a conveyance to himself and his co-trustee, and obtained possession of the title deeds, and fraudulently handed them over to the mortgagor, who suppressed the mortgage deed, and deposited the rest of the deeds with a bank to secure his current account, and the manager of the bank requiring a certificate of title, the mortgagor referred him to the solicitor who had fraudulently handed over to him the deeds, who gave a certificate that there was a good title; it was held that by reason of the fraud of the solicitor notice of the mortgage could not be imputed through him to the bankers (g).

The same considerations apply where one solicitor is employed by both parties to a transaction, and the evidence establishes the fact that the solicitor has entered into a conspiracy with one client to defraud the other (h). Nor is notice to a solicitor notice

(e) 21 Ch. D. 707.

(f) 20 Eq. 251.

(g) *Ib.*

(h) *Sharp v. Foy*, 4 Ch. 35.

to a client where the person giving the information knows or has good reason to believe that it will not be communicated to the client (*i*).

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Though a client may by reason of the fraud of a solicitor be not affected with notice through the fraud of the solicitor, he may be affected by his negligence (*k*).

In determining the equities between parties who have been defrauded by a common solicitor, the Court looks to see whether there has been anything in the transaction calculated to put either of the parties upon inquiry. If there be anything in the case calculated to excite suspicion or to put either of the parties upon inquiry, and he abstains from inquiry, the same knowledge will be imputed to him as he would have been affected with, had he employed an independent solicitor (*l*).

Notice to one partner in a partnership matter during the continuance of the partnership is notice to the other partners (*m*). Notice to partner.

A partner, however, is not necessarily fixed with notice of the contents of his own books (*n*). Nor is the knowledge of a fraud by one partner necessarily the knowledge of the firm (*o*).

The rule that notice to one partner is notice to the other partners does not apply to the case of corporations or joint-stock companies. Notice on the part of a shareholder, or non-acting director, does not affect the whole body (*p*); but notice to one of the persons legally intrusted with the proper business to which the notice relates, or who has authority to act for the corporation in the particular matter in regard to which the notice is given, will bind the corporation (*q*). Notice, however, to the officer of a corporation, or knowledge obtained by him whilst not engaged officially in the business of the com- Notice to directors or shareholders of a company.

(*i*) *Sharp v. Foy*, 4 Ch. 35.

(*n*) See *Stewart's Case*, 1 Ch. 574.

(*k*) *Hopgood v. Ernest*, 3 D. J. & S. 116.

(*o*) *Williamson v. Barbour*, 9 Ch. D. 529, per Jessel, M. R.

(*l*) *Kennedy v. Green*, 3 M. & K. 699; *Frail v. Ellis*, 16 Beav. 357; *Atterbury v. Wallis*, 25 L. J. Ch. 794; *Perry v. Holl*, 2 D. F. & J. 38.

(*p*) *Powles v. Page*, 3 C. B. 16; *Re Carew's Estate*, 31 Beav. 45.

(*m*) *Atkinson v. Macreth*, 2 Eq. 570. See *Williamson v. Barbour*, 9 Ch. D. 535.

(*q*) *Worcester Corn Exchange Co.*, 3 D. M. & G. 183; *Re Carew's Estate*, 31 Beav. 45; *Parsons on Contracts*, p. 65.

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pany, is inoperative as notice to the latter. But in the case of a joint agency (*e. g.*, the directors of a company), notice to either whilst engaged in the business of his agency is notice to the principal (*r*).

There is no presumption of law that a director knows the contents of the books of the company (*s*).

A shareholder in a company formed under the Companies Act, 1862, is not necessarily fixed with a knowledge of the contents of the memorandum or articles of association of the company (*t*). But he must, within a reasonable time after the registration of the memorandum and articles of association, be presumed to acquaint himself with their contents. After the lapse of a reasonable time he cannot be heard to say that he had no knowledge of their contents. What will be a reasonable time may in some degree vary in different cases, but must always be measured with reference to the thing to be done (*u*).

The shareholders in a company are not bound to look into the management, and will not be held bound to have notice of everything which has been done by the directors, who may be assumed by the shareholders to have done their duty (*x*).

Notice to one of several trustees is, as a general rule, notice to all (*y*), but not where the trustee to whom alone notice is given has an interest adverse to that of his co-trustee, as *e. g.*, where he has a beneficial interest which he has secretly incumbered (*z*).

The registration of an assurance is not of itself notice. A prior equitable incumbrance will not, although registered, affect a subsequent purchaser without notice who has obtained the legal estate (*a*). But if a purchaser search the register, he will be presumed to have notice, unless the presumption can be re-

Notice to
trustees.

Registration of
an assurance is
not notice.

(*r*) *Bank of United States v. Davies*, 2 Hill (Amer.), 462. But see *Story on Agency*, ss. 140 *a*, 140 *b*.

(*s*) *Hallmark's Case*, 9 Ch. D. 329.

(*t*) *Stewart's Case*, 1 Ch. 574.

(*u*) *Lawrence's Case*, 2 Ch. 425 ; *Wilkinson's Case, Re Madrid Bank*, ib. 540.

(*x*) *Stanhope's Case*, 1 Ch. 161.

But see *Walford v. Adie*, 5 Ha. 112, 119.

(*y*) *Ex parte Rogers*, 8 D. M. & G. 271 ; *Willes v. Greenhill*, 4 D. F. & J. 147.

(*z*) *Brown v. Savage*, 4 Drew. 635.

(*a*) *Morecock v. Dickens, Amb.* 678 ; *Bushell v. Bushell*, 1 Sch. & Lef. 98.

butted by showing that the search was made for a period only in which the registered deeds are not included (*b*). There is a material distinction in the effect of registration between the Register Acts of Ireland and those of England. By the Irish Act 6 Anne, c. 2, an absolute priority is expressly given to the instrument first registered, so that a subsequent purchaser, having the legal estate, though he has not notice of an equity arising under a deed previously registered, will be bound and compelled to give effect to it (*c*); and all unregistered deeds, though prior in date, are absolutely void as against the registered deed (*d*).

At law, notwithstanding notice, mere priority of registration absolutely determines the right to the property as between persons claiming under adverse registered instruments, purporting to pass the legal estate (*e*); but in equity, notwithstanding the stringent language of the Registration Acts, registration is no protection against an unregistered assurance of which the party claiming under the registered instrument had notice prior to the completion of his purchase or security (*f*). The object of the Registration Acts being to give notice, the evils against which those statutes intended to guard do not exist where a man has notice independently of the registry. If, therefore, a man has notice of an earlier deed, which though executed is not registered, the registration which he actually effects will not give him priority over the earlier deed (*g*). The

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Registration with
notice of un-
registered
assurance.

(*b*) *Hodgson v. Dean*, 2 Sim. & St. 221, affd. See Sug. V. & P. 761. Comp. *Procter v. Cooper*, 2 Drew. 1, 1 Jur. N. S. 149.

(*c*) *Bushell v. Bushell*, 1 Sch. & Lef. 98; *Latouche v. Lord Dunsany*, ib. 159, 160; *Drew v. Lord Norbury*, 3 J. & L. 267; *Mill v. Hill*, 3 H. L. 828.

(*d*) *Carlisle v. Whaley*, 2 E. & I. App. Ca. 391.

(*e*) *Doe v. Alsop*, 5 B. & Ald. 142.

(*f*) *Le Neve v. Le Neve*, 3 Atk. 646; *Eyre v. McDowell*, 9 H. L. 619; *Re Rorke's Estate*, 13 Ir. Ch.

271. See *Nixon v. Hamilton*, 2 Dr. & Wal. 391; *Benham v. Keane*, 1 J. & H. 685, 3 D. F. & J. 318; *Agra Bank v. Barry*, 7 E. & I. App. Ca. 148.

(*g*) *Sheldon v. Cox*, 2 Eden, 224; *Bushell v. Bushell*, 1 Sch. & Lef. 102; *Eyre v. McDowell*, 9 H. L. 619, 646; *Chadwick v. Turner*, 1 Ch. 310; *Agra Bank v. Barry*, 7 E. & I. App. Ca. 148; *Kettlewell v. Watson*, 21 Ch. D. 685; *Bradley v. Riches*, 9 Ch. D. 193; *Punchard v. Tomkins*, 31 W. R. 287.

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notice must, however, amount to actual notice (*h*). Constructive notice is not sufficient (*i*). But the actual knowledge of a solicitor will be imputed to a client (*k*).

A purchaser or mortgagee is not bound to make any inquiries with a view to the discovery of unregistered instruments. But if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, and has abstained from inquiry with a view to avoid notice, the Court may postpone him; but the case must be one in which the Court is able to come to a clear decision as to the fact of fraud (*l*). The non-production in a register county of deeds to the solicitor instructed to prepare a mortgage upon an estate there will not of itself be deemed a proof that the solicitor has acted fraudulently or even negligently so as to affect the interests of his client. The construction to be put upon his conduct does not depend on an inflexible rule of law, but upon the circumstances of the case (*m*). Where, therefore, the owner of an estate in Ireland had already created an equitable mortgage upon it by depositing the deeds with a creditor (which equitable mortgage was not registered), and afterwards, on being asked for them by a solicitor who was about to prepare a mortgage for another creditor, gave an excuse for their non-production, which under the circumstances appeared satisfactory, and also supplied in his own handwriting a summary of their contents, and the solicitor, in total ignorance of the equitable mortgage and of all that had been previously done, prepared the legal mortgage, which was duly registered, it was held that the legal mortgage had priority over the equitable mortgage and was not assailable on the ground that the solicitor had improperly acted in preparing it without insisting on the production of the deed (*n*).

The Registry Acts do not apply to interests in land which are created in equity without writing (*o*). A man who takes a

(*h*) *Wyatt v. Barwell*, 19 Ves. 435;
Chadwick v. Turner, 1 Ch. 310.

(*i*) *Reilly v. Garnett*, 1 R. 7 Eq.
25; *Agra Bank v. Barry*, 7 E. & I.
App. Ca. 148; *Lee v. Clutton*, 46 L.
J. Ch. 48.

(*k*) *Bradley v. Riches*, 9 Ch. D. 193.

(*l*) *Lee v. Clutton*, 46 L. J. Ch. 48.

(*m*) *Agra Bank v. Barry*, 7 E. & I.
App. Ca. 149.

(*n*) *Ib.*

(*o*) *Sumpter v. Cooper*, 2 B. & Ad.
223; *Kettlewell v. Watson*, 21 Ch. D.
685.

mere deposit of title deeds without writing or a written instrument will not lose his security by the mere registration of a conveyance subsequently dealing with the property, the subject matter of the title deeds (*p*). But if an equitable mortgage by deposit of title deeds be accompanied by writing, it becomes capable of registration, and should be registered (*q*).

A purchaser, who has advanced his money and taken a conveyance without notice of a prior deed unregistered (*r*), of which has been imperfectly registered, may, upon acquiring a notice of it, register his own deed and so gain priority (*s*). So also may a purchaser whose equitable title has been completed before notice of a prior unregistered equity, but who afterwards obtains such notice, protect himself by registration (*t*).

The same principles were held under the old law to apply to the case of a purchaser with notice of undocketed judgments (*u*); but under the new law a purchaser, even with notice, is not bound by a judgment, unless it has been duly registered in the Common Pleas (*v*); nor will notice of a registered judgment affect a purchaser, unless it has been re-registered in due time (*w*). As between judgment creditors notice is not material (*x*).

Purchasers of lands in Middlesex are bound by notice of unregistered or undocketed judgments, but as between judgment creditors notice is not material. A prior judgment creditor has no equity against a subsequent judgment creditor, who has registered with notice (*y*).

The registration of a judgment is not notice (*z*), unless a

Registration of judgments.

(*p*) *Re Burke's Estate*, 9 L. R. I. 41.

(*q*) *Reilly v. Garnett*, I. R. 7 Eq. 26.

(*r*) *Elsey v. Lutyens*, 8 Ha. 159.

(*s*) *Essex v. Brough*, 1 Y. & C. C. 620.

(*t*) *Reilly v. Garnett*, I. R. 7 Eq. 26.

(*u*) *Davis v. Lord Strathmore*, 16 Ves. 419; Sug. V. & P. 521.

(*v*) Sug. V. & P. 533.

(*w*) 18 Vict. c. 15, s. 3. See

Beaven v. Lord Oxford, 6 D. M. & G. 492; *Shaw v. Neale*, 6 H. L. 584; *Benham v. Keane*, 1 J. & H. 685, 3 D. F. & J. 318; *Evans v. Williams*, 34 L. J. Ch. 485.

(*x*) *Benham v. Keane*, 1 J. & H. 685, 3 D. F. & J. 318. See *Evans v. Williams*, 34 L. J. Ch. 485.

(*y*) *Benham v. Keane*, 3 D. F. & J. 318.

(*z*) *Churchill v. Grove*, 1 Ch. Ca. 35, Freem. Ch. Ca. 176; *Lane v. Jackson*, 20 Beav. 535.

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search has been made for judgments, in which case notice will be presumed (*a*) ; but it seems that a title depending on the fact of the vendor having been a purchaser without notice of a registered judgment cannot be forced on a purchaser (*b*).

Act of Parlia-
ment, *lis*
pendens, &c.,
notice.

A purchaser may be affected with constructive notice, not through his knowledge of any fact leading him to actual notice, but by his neglect of the usual and recognised means for acquiring such knowledge or notice. For instance, a public Act of Parliament is notice to all the world (*c*) ; so is a *lis pendens* if registered under 2 Vict. c. 11, or a deed or will registered in a registered county or entered on Court Rolls, if the purchaser search over the period within which the instrument is registered (*d*) or the entry is made (*dd*).

SECTION IV.—FRAUD UPON MARRIAGE ARTICLES.

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Another class of frauds upon third parties, which will be relieved against, is where persons, after doing acts required to be done on a treaty of marriage, render those acts unavailing by entering into other secret agreements, or derogate from those acts, or otherwise commit a fraud upon the relatives or friends of one of the contracting parties (*e*) ; as where a parent declines to consent to a marriage on account of the intended husband being in debt, and the brother of the latter gives a bond for the debt to procure such consent, and the intended husband then gives a counter-bond to his brother to indemnify him against the first bond (*f*). So, also, where a creditor of the intended husband concealed his own debt and misrepresented to the lady's father the amount of the debts of the intended husband, the transaction was treated as a fraud upon the marriage, and the creditor was restrained from enforcing his debt at law against the hus-

(*a*) *Procter v. Cooper*, 2 Drew. 1, 1 Jur. N. S. 149.

(*b*) *Freer v. Hesse*, 4 D. M. & G. 495.

(*c*) *Dart, V. & P.* 863.

(*d*) *Hodgson v. Dean*, 2 Sim. & St. 221.

(*dd*) *Dart, V. & P.* 863.

(*e*) *Peyton v. Bladwell*, 1 Vern.

240.

(*f*) *Redman v. Redman*, 1 Vern. 348 ; *Turton v. Benson*, 1 P. Wms. 496 ; *Scott v. Scott*, 1 Cox, 366 ; *Palmer v. Neave*, 11 Ves. 166.

band after the marriage (*g*). So, also, where a brother on the marriage of his sister let her have a sum of money privately that her fortune might appear to be as much as was insisted on by the other side, and the sister gave a bond to the brother to repay it, the bond was set aside (*h*). So, also, where the money due by an intended husband upon a mortgage was represented by the mortgagee to the relations of the wife to be much less than was really due, he was not allowed to recover more than he had represented the debt to amount to (*i*).

Another case of fraud upon marriage articles is where a father, who had on the marriage of his daughter covenanted that he would upon his death leave her certain tenements, and would also by his will give and leave her a full and equal share with her brothers and sisters of all his personal estates, transfers afterwards during his life a very large portion of his personal property to his son, retaining the dividends for his own life (*k*). Covenants of this sort do not prohibit a parent from making any disposition of his property during his lifetime among his children more favourable to one than another. But they do prohibit a man from doing any acts which are designed to defeat or defraud the covenant. A parent may, if he pleases, notwithstanding the covenant, make an absolute gift to a child; but the gift must be an absolute and unqualified one, and must not be a mere reversionary gift, which saves the income to the parent during his own life (*l*).

SECTION V.—FRAUD UPON THE MARITAL RIGHTS.

Another class of transactions which will be relieved against as being in fraud of the marriage contract are conveyances made

(*g*) *Neville v. Wilkinson*, 1 Bro. C. C. 543. See *D'Albiac v. D'Albiac*, 16 Ves. 124; *Morris v. Clarkson*, 1 J. & W. 107.

(*h*) *Gale v. Lindo*, 1 Vern. 475; *Lamlee v. Hannan*, 2 Vern. 499.

(*i*) *Burgett v. Wells*, Prec. Ch. 131.

(*k*) *Jones v. Martin*, 3 Anst. 882, 5 Ves. 265 n.; 8 Bro. P. C. 242. See *Randall v. Willis*, 5 Ves. 261; *M'Neill v. Cahill*, 2 Bligh, 228. Comp. *Stocken v. Stocken*, 4 M. & C. 95; *Bell v. Clarke*, 25 Beav. 436.

(*l*) *Jones v. Martin*, 3 Anst. 882, 5 Ves. 265 n.

by an unmarried woman of her property, during the treaty of marriage, without the knowledge of her intended husband, in contravention of his marital rights, or in disappointment of his just expectations (*n*). Several circumstances appear to have been thought material as negating the imputed fraud: such, for instance, as the poverty of the husband, the fact that he has made no settlement on the wife, the fulfilment of a moral obligation, as in the case of a settlement upon the children of a former marriage, or of a bond given to secure a debt contracted for a valuable consideration, or the fact of the ignorance of the husband that his wife possessed the property (*n*). There can be no doubt that any of these facts would be a good ground for insisting that there should be a settlement, but it is not so easy to understand why they should constitute reasons for practising concealment upon him, or for treating such concealment as immaterial (*o*). If both the property and the mode of its conveyance, pending the marriage treaty, were concealed from the intended husband, there still is or may be a fraud practised on him. It is true that the non-acquisition of the property is no disappointment, but still his legal right is defeated, and the conveying away of the property for the benefit of a third person or the vesting and continuance of a separate power in the wife over property which ought to have been his, and which is without his consent made independent of his control, is a surprise upon him, and might, if previously known, have induced him to abstain from the marriage (*p*). The mere fact, however, of

(*m*) *Lance v. Norman*, 2 Ch. Rep. 41; *Lady Strathmore v. Bowes*, 2 Bro. C. C. 345, 2 Cox, 33, 1 Ves. Jr. 22; *Goddard v. Snow*, 1 Russ. 485; *England v. Douns*, 2 Beav. 522; *Taylor v. Pugh*, 1 Ha. 608; *Llewellyn v. Cobbold*, 1 Sm. & G. 376; *Downes v. Jennings*, 32 Beav. 290. See *Louler v. Clark*, 2 Mac. & G. 387; *Chambers v. Crabbe*, 34 Beav. 457. A secret settlement by a woman of her property during a treaty of marriage, is not necessarily void at law. *Doe d. Richards v. Lewis*, 11 C. B.

1035.

(*n*) *Hunt v. Matthews*, 1 Vern. 408; *Taylor v. Pugh*, 1 Ha. 608. See *Downes v. Jennings*, 32 Beav. 290.

(*o*) *England v. Downs*, 2 Beav. 522, 529; *Taylor v. Pugh*, 1 Ha. 608, 613; *Chambers v. Crabbe*, 34 Beav. 457. See *Poulson v. Wellington*, 2 P. Wms. 533; *Lady Strathmore v. Bowes*, 2 Bro. C. C. 345, 6 Bro. P. C. 427, 1 Ves. Jr. 22.

(*p*) *Carleton v. Earl of Dorset*, 2 Vern. 17; *Goddard v. Snow*, 1 Russ.

concealment, or rather the non-communication to him, is not necessarily and under all circumstances equivalent to fraud. In the absence of any representation as to specific property, there is no implied contract on the part of the lady that her property shall not be in any way diminished before the marriage : but it is for the Court to determine in each case whether, having regard to the condition of the parties and the other attendant circumstances, a transaction complained of by the husband should be treated as fraudulent (*q*). Where the husband has so conducted himself towards the intended wife that she cannot without disgrace retire from the marriage, as where he had induced her to cohabit with him before marriage, a settlement made by her of her property without his knowledge will not be treated as in fraud of his marital rights (*r*).

The equity in favour of the husband does not arise, unless it can be clearly made out that at the time of the conveyance of her property by the wife there was an engagement of marriage between them (*s*). A conveyance to be fraudulent must be made in contemplation of a particular marriage (*t*). Nor has the husband any equity to set it aside, if before the marriage he has notice that the intended wife has dealt in some way with her property. It is essential to the application of the principle that the husband should, up to the moment of the marriage, have been kept in ignorance of the transaction. If he has notice before the marriage that the lady intended to make a settlement of her property, and nothing took place to justify a belief on his part that at the time of the marriage no such settlement had been made, he has no equity to set it aside, although he may not be proved to have been aware of any settlement having been actually made. If the husband has notice that the property has been in some way dealt with and makes

485 ; *England v. Downs*, 2 Beav.

522, 529 ; *Downes v. Jennings*, 32

Beav. 290 ; *Tabor v. Cunningham*,

24 W. R. 156.

(*q*) *De Manneville v. Compton*, 1

V. & B. 354 ; *St. George v. Wake*, 1

M. & K. 610 ; *Taylor v. Pugh*, 1 Ha.

608.

(*r*) *Taylor v. Pugh*, 1 Ha. 608.

(*s*) *England v. Downs*, 2 Beav.

522 ; *Griggs v. Staplee*, 2 Deg. & S.

572.

(*t*) *Maber v. Hobbs*, 2 Y. & C. 317.

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no inquiry, he is bound by what has been done. It is enough that he had notice of the intended settlement, though he may not have been aware of the trusts (*u*).

If a bond be given by a woman before marriage to secure a debt contracted for valuable consideration, there is no fraud on the husband though it be concealed from him (*x*).

The right of the husband to impeach a transaction, as being in fraud of his marital rights, may be lost by acquiescence or delay (*y*) ; nor have his representatives after his death any equity against the wife, if he does not before his death discover the fraud upon his marital rights (*z*).

A wife has no similar equity to have a conveyance of the property of or a security given by the intended husband set aside as being a fraud upon her marital rights (*a*). But where upon a marriage the father of the husband agreed to give up to him a farm and stock in consideration of the wife's fortune being paid to the father, it being then stated that the intended husband was not indebted to any extent, and a deed was drawn up and executed in pursuance of the agreement, and on the same day that the deed was executed the intended husband gave his father a promissory note for 200*l.*, it was held that the giving this note, coupled with the statement that the son was not indebted to any extent, was a fraud upon the intended wife and her father who gave the fortune, and that the father of the husband could not recover on the note against his son if he was alive, nor against his assets after his death (*b*).

SECTION VI.—MARRIAGE AND PLACE BROKAGE BONDS.

Sect. 6.

Another class of transactions which are relieved against as being in fraud of third parties, are contracts or agreements to

(*u*) *St. George v. Wake*, 1 M. & K. 610 ; *England v. Downs*, 2 Beav. 522 ; *Griggs v. Staplee*, 2 Deg. & S. 572 ; *Wrigley v. Swainson*, 3 Deg. & S. 458. See *Prideaux v. Lonsdale*, 1 D. J. & S. 433.

V. & B. 354 ; *Loader v. Clarke*, 2 Mac. & G. 382 ; *Downes v. Jennings*, 32 Beav. 290. See *infra*.

(*z*) *Grazebrook v. Percival*, 14 Jur. 1103.

(*a*) *M^cKeogh v. M^cKeogh*, 1 R. 4 Eq. 338.

(*x*) *Blanchet v. Foster*, 2 Ves. 264.

(*b*) *Ib.*

(*y*) *De Manneville v. Compton*, 1

negotiate a marriage between two parties for a certain compensation (*c*). In some early cases, *Grisley v. Lother* (*d*), and a case cited in *Hall v. Potter* (*e*), a marriage brokage bond was held good at law ; but these cases cannot be considered law. The better opinion would seem to be that a marriage brokage bond is void at law upon grounds of public policy. In equity it has long been settled that such bonds will be relieved against, as well upon grounds of public policy, as because they tend to induce the exercise of undue influence in the promotion of marriages, and are a fraud on the families of those who are so induced to marry without taking the advice of their friends (*f*). Marriage brokage contracts are so adverse to public policy as not to be capable of confirmation (*g*) : and even money paid under them may be reclaimed (*h*). It makes no difference that the marriage is between persons of equal rank, age, and fortune, for the contract is equally open to objection upon general principles, as being of dangerous consequence (*i*). The principle has even gone further, and a bond given for assisting a clandestine marriage has been set aside, though given voluntarily after the marriage and without any previous agreement for the purpose (*k*).

Upon a similar ground, if a parent or guardian, or any person nearly connected to a party privately connive with a third person, and agree to procure a marriage between such parties in consideration of a certain compensation, or agree upon payment of a certain sum to consent to such marriage, the contract is

(*c*) See *Worsley v. De Mattos*, 1 Burr. 476, per Lord Mansfield.

(*d*) Hob. 10.

(*e*) 3 Lev. 412.

(*f*) *Hall v. Potter*, 3 Lev. 412, Show. P. C. 76 ; *Arundel v. Trevillian*, 1 Ch. Rep. 47 ; *Law v. Law*, Ca. t. Talb. 140, 142 ; *Cole v. Gibson*, 1 Ves. 503 ; *Vauxhall Bridge Co. v. Spencer*, Jac. 67 ; *Boynton v. Hubbard*, 7 Mass. (Amer.) 112. The civil law does not seem to have held contracts of this sort in such severe rebuke, for it allowed *proxeneta*, or

match-makers, to receive a reward for their services to a limited extent. Story, Eq. Jur. 260.

(*g*) *Cole v. Gibson*, 1 Ves. 503, 506, 507 ; *Roche v. O'Brien*, 1 Ea. & Be. 358.

(*h*) *Smith v. Bruning*, 2 Vern. 392 ; *Goldsmith v. Bruning*, 1 Eq. Ca. Ab. 89.

(*i*) *Hall v. Potter*, 3 Lev. 411, 1 Fonb. bk. 1, c. 4, s. 10.

(*k*) *Williamson v. Gibson*, 2 Sch. & Lef. 357.

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utterly void upon the ground that it is a bargain in contravention of the rights of third parties, whose interests are thus controlled and sacrificed (*l*).

Of a kindred nature to marriage brokerage contracts and governed by the same rule, are cases where bonds are given, or other agreements made as a reward for using influence and power over another person to induce him to make a will in favour of the obligee and for his benefit, for all such contracts tend to the deceit and injury of third parties, and encourage artifice and improper attempt to control the exercise of their free judgment (*m*). But such cases are carefully to be distinguished from those in which there is an agreement among heirs or other near relatives to share the estate equally between them, whatever may be the will made by the testator; for such an agreement is generally made to suppress fraud and undue influence, and cannot truly be said to disappoint the testator's intention, if he does not impose any restriction on his devisee (*n*).

Office brokerage
bonds.

Of a kindred nature to marriage brokerage contracts are office brokerage bonds. Bonds of this sort are fraudulent, and therefore void upon grounds of public policy, the tendency of such bonds being to introduce unfit persons into places of great public trust, and to defraud the public of the service of the most efficient candidates or officers (*o*).

SECTION VII.—BONDS TO MARRY.

Sect. 7.

A bond given by a young woman secretly to a man, conditioned to pay him a sum of money, if she did not marry him on the death of the parent or other individual from whom she has expectancies, but kept secret from him, is in equity looked

(*l*) *Peyton v. Bludwell*, 1 Vern. 240; *Stribblehill v. Brett*, 2 Vern. 445; *Keat v. Allen*, ib. 588, 1 Fonb. Eq. bk. 1, c. 4, s. 11; *Story*, Eq. Jur. 266, 267.

(*m*) *Debenham v. Oe*, 1 Ves. 276.

(*n*) *Beckley v. Newland*, 2 P. Wms. 151; *Hurwood v. Tooke*, 2 Sim. 192;

Wethered v. Wethered, ib. 183; *Story*, Eq. Jur. 265, 785.

(*o*) *Law v. Law*, Ca. t. Talb. 140, 3 P. Wms. 391; *Morris v. McCulloch*, 2 Eden, 190; *Hannington v. Du Chatel*, 1 Bro. C. C. 124; *Hartwell v. Hartwell*, 4 Ves. 811; *Osborne v. Williams*, 18 Ves. 379.

on as a fraud on the parent or other individual, from whom she has expectations, who disapproved of the marriage, and might be misled into making a provision for her, which, had he known of the bond, he might have done in such a manner as would have prevented the marriage (*p*).

SECTION VIII.—FRAUD IN WITHHOLDING CONSENT TO MARRIAGE.

Gifts and legacies are often bestowed upon persons upon condition that they shall not marry without the consent of parents, guardians, or other confidential persons. If such consent to the marriage is withheld from a corrupt motive, the Court of Chancery may interfere. It has been contended that if the person whose consent is required is interested in withholding it, he must show a reason for his dissent. But if the author of the trust chooses to require the consent of a person whom he knows at the time to have an interest in refusing it, it is difficult to conceive an equity interfering with his choice. At all events, no equity will arise if the trustee has meant to act honestly, though his decision may not be the same as that at which the Court would have arrived (*q*).

SECTION IX.—FRAUD IN RESPECT OF EXPECTANCIES.

It would appear to have been partly, if not mainly, on the ground that a bargain with an expectant heir in respect of his expectancy during the life, and without the knowledge of the person from whom the expectancy was looked for, was a fraud on the latter, that a bargain with an expectant heir was liable to be opened and set aside upon the ground merely of under-value (*r*). Where, however, the heir deals not behind the back of

(*p*) *Woodhouse v. Shepley*, 2 Atk. 536; *Cock v. Richards*, 10 Ves. 429.

(*q*) *Clarke v. Parker*, 19 Ves. 1.

(*r*) *Davis v. Duke of Marlborough*, 2 Sw. 140, 143; *King v. Hamlet*, 2 M. & K. 456, *supra*, p. 169.

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his father, but with his sanction and assistance, and has all the protection which his father can give him, he is not entitled to relief, as if the contract had been entered into without such parental protection (*s*). So, also, a fair and *bonâ fide* agreement between expectants to share equally, or in a certain manner, the property which might be left them, although entered into behind the back of the person from whom the expectancy is looked for, has always been held valid in equity (*t*).

SECTION X.—FRAUD IN RESPECT OF SALES BY AUCTION.

Sect. 10.

Agreements whereby parties for the purpose of preventing competition at an auction, and of depressing the value of the property below its market price, engage not to bid against each other, have been held in some American cases to operate as a fraud upon third parties (*u*). But it is difficult to see upon what principle it can be maintained that a mere agreement between two persons, each desirous of effecting the purchase of an estate, that they will not bid against each other, but that one shall retire and leave the field open to the other, can be held to invalidate the sale, and in two cases before our own courts an agreement to this effect has been held good (*x*).

In sales by auction the employment by the vendor of a puffer or agent to bid for the purpose of increasing the price without disclosing the fact was held by the Courts of Common Law to be fraudulent, and the purchaser might avoid the sale (*y*), and

(*s*) *King v. Hamlet*, 2 M. & K. 456; *O'Rorke v. Bolingbroke*, 2 App. Ca. 834.

(*t*) *Beckley v. Newland*, 2 P. Wms. 182; *Wethered v. Wethered*, 2 Sim. 183; *Harwood v. Tooke*, ib. 192; *Hyde v. White*, 5 Sim. 524; *Lyde v. Mynn*, 1 M. & K. 683. See *Houghton v. Lees*, 1 Jur. N. S. 862; *Heap v. Tonge*, 9 Ha. 100.

(*u*) *Jones v. Caswell*, 3 Johns.

(Amer.), 29; *Doolin v. Ward*, 6 Johns. (Amer.), 194; *Wilbur v. How*, 8 Johns. (Amer.), 444; *Hawley v. Cramer*, 4 Cow. (Amer.), 717; *Brisbane v. Adams*, 3 Const. (Amer.), 129; Story, Eq. Jur. 293.

(*x*) *Galton v. Emuss*, 1 Coll. 242; *Re Carew's Estate*, 26 Beav. 187.

(*y*) *Green v. Baverstock*, 14 C. B. N. S. 204.

bids by the auctioneer as the vendor's agent have the same effect (z). Courts of equity drew a distinction between the employment of a bidder for the purpose of protecting the property from being sold at an undervalue, which was not considered fraudulent, and the employment of a bidder to increase the price; but the employment of more persons than one to bid was held to be fraudulent, because only one could be necessary for the protection of the property, and the employment of more could only be for the purpose of increasing the price (a). In order to remove any conflict between the rule at law and in equity upon the subject in the case of sales by auction of land the Sale of Land by Auction Act, 30 & 31 Vict. c. 48, was passed, enacting by sec. 4 that where a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law (b).

The announcement that property is to be sold by auction "without reserve" imports that there shall be no bidding directly or indirectly on the part of the vendor, and the employment of any bidder at a sale under such conditions is fraudulent. "Where," said Lord Cottenham, in *Robinson v. Wall* (c), "a property is offered for sale without reserve, the meaning and the only meaning that can be attached to it is that of the bidders who choose to attend the sale, whoever bids the highest shall be the purchaser; that the biddings shall be left to themselves, and that there shall be no bidding on the part of the vendor, and it is not without reserve, the biddings are not left to themselves, if any means or contrivance, it matters not what, be resorted to for the purpose of preventing the effect of open competition. I consider, therefore, the term 'without reserve' to exclude any interference on the part of the vendor or of those who come in under him which can under any possible circumstances affect the right of the highest bidder to have the

(z) *Parfit v. Jepson*, 46 L. J. C. P. 529. *Flint v. Woodin*, 9 Ha. 618.

(b) See *Heatley v. Newton*, 19 Ch. D. 326.

(a) *Woodward v. Miller*, 2 Coll. 279; *Robinson v. Wall*, 2 Ph. 372; (c) 2 Ph. 375.

property knocked down to him, and *that* without reference to the amount to which that highest bidder shall go" (*d*).

In a case where a sale was stated to be "without reserve but with liberty to the parties interested to bid," it was held that the purchaser could not avoid his contract upon the ground that the vendor had increased the price by bidding against him (*e*).

With respect to sales "without reserve" the above statute has enacted by sec. 5 that the particulars or conditions of sale by auction of land shall state whether such land will be sold without reserve or subject to a reserve price or whether a right to bid is reserved, and that if it is stated that such land shall be sold without reserve it shall not be lawful for the seller to employ any person to bid at such sale or for the auctioneer to take knowingly any bidding from any such person.

The section makes a distinction between a reserved price and a reserved right to bid, and under conditions stating the former only it is not competent for the vendor to employ a person to bid up to the price stated to be reserved, and a sale effected by means of such bidding was set aside (*f*).

By sec. 6 it is enacted that where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid, it shall be lawful for the seller or any one person on his behalf to bid; but in a case where the seller reserved a right to bid once, and the auctioneer, with his sanction, bid thrice, the sale was held voidable at the option of the purchaser (*g*). It seems that a seller's right to bid once would be exercised by the auctioneer starting the property at a price or by the seller or auctioneer naming a reserve (*h*).

Sec. 7 takes away the power of the Court to open biddings after sales by auction of land under its authority unless on the ground of fraud or improper conduct in the management of the sale (*i*).

(*d*) See *Thornett v. Haines*, 15 M. & W. 372, *per* Lord Wensleydale.

(*e*) *Dimmock v. Hallett*, 2 Ch. 26.

(*f*) *Gilliatt v. Gilliatt*, 9 Eq. 60.

(*g*) *Parfit v. Jepson*, 46 L. J. C. P. 529.

(*h*) *Ib.* 531, *per* Grove, J.

(*i*) See *Delves v. Delves*, 20 Eq. 77.

On the other hand, if a purchaser procure a sale to himself by fraudulently or wrongfully preventing other persons from bidding, the vendor may avoid the sale (*k*). So, also, where the purchaser employed the vendor's agent to bid for him, which deterred other persons from bidding who supposed him to be bidding for the vendor, it was held sufficient ground for refusing specific performance (*l*).

(*k*) *Fuller v. Abrahams*, 3 B. & B. C. 326. See *Mason v. Armitage*, 13 116. Ves. 25.

(*l*) *Twining v. Morrice*, 2 Bro. C.

CHAPTER V.

MISCELLANEOUS FRAUDS.

SECTION I.—FRAUD IN WILLS.

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Sect. I.

FRAUDS upon testators in the making of wills are a class of frauds against which the Court will relieve.

The execution of a will with due solemnities by a person of competent understanding and apparently a free agent being duly proved, the presumption is that the testator was cognisant of its contents, and that the instrument expresses his will (*a*), unless there be other circumstances to lead to a different conclusion, in which case the burden of proof lies upon the party propounding the will, and the Court will not pronounce in its favour unless it is judicially satisfied that the instrument propounded is the last will of a free and capable testator (*b*). Anyone who questions the validity of a will is entitled to put the person who alleges that it was made by a capable testator upon proof that he was of sound mind at the time of execution (*c*).

By the Roman law *qui se scripsit heredem* could take no benefit under a will (*d*). This is not the case by the law of England, but if a person benefited by a will has himself prepared it or procured it to be prepared, the law looks on the case with suspicion, and the Court requires clear and satisfactory proof that the testator knew and approved the contents of the instrument, and that it expressed his real intentions (*e*). If there be

(*a*) *Boyse v. Russborough*, 6 H. L. 49 ; *Browning v. Budd*, 6 Moo. P. C. 435.

(*b*) *Browning v. Budd*, *ib*.

(*c*) *Smee v. Smee*, 5 Pr. D. 90.

(*d*) Dig. lib. 34, s. 8.

(*e*) *Paske v. Ollatt*, 2 Phillim. 324 ; *Baker v. Batt*, 2 Moo. P. C. 321 ; *Barry v. Butlin*, *ib*. 491 ; *Greville v. Tylee*, 7 Moo. P. C. 320.

no evidence of instructions previously given, or knowledge of its contents, the party propounding it must prove by evidence of some description or other that the testator knew and approved of the instrument (*f*). The *onus* of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestine and other circumstances, which may increase the presumption even so much as to be conclusive against the instrument (*g*).

"Proof of knowledge of the contents of a will," said Dr. Lushington in *Durnell v. Corfield* (*h*), "may be given in any form. The degree of proof depends on the circumstances of each case. Although in perfect capacity, knowledge of the contents will be inferred; yet where capacity is impaired, and the benefit of the drawer of the will large, the suspicion is strong, and the proof must be most stringent. The Court must be satisfied of proof of knowledge of the contents of the will. I must add another ingredient—the nature of the instrument executed, its simplicity or complexity, because when you are measuring the power of a weakened intellect the quality of the subject to which it is to be applied must always be an important test. Where the drawer of an instrument gives himself a benefit under the instrument, it is a case for suspicion, depending more or less upon the circumstances of each individual case that the proof must be in proportion to the degree of suspicion, which of course will vary. The greater the benefit and the less the capacity, the more stringent is the requirement of proof of knowledge of the contents."

If a testator being of sound mind and capacity has read the will, there is, as a general rule, sufficient evidence to show that he knew and approved of its contents (*i*). So also if a will has been read over to a capable testator on the occasion of its execution, or there is evidence to show that its contents have been brought to his notice in any other way, this fact when coupled

(*f*) *Barry v. Butlin*, 2 Moo. P. C. 491; *Mitchell v. Thomas*, 6 Moo. P. C. 137. *Greville v. Tylee*, 7 Moo. P. C. 320; *Ashwell v. Lomi*, 2 Pr. & Div. 477.

(*h*) 1 Roberts, 63.

(*g*) *Paske v. Ollatt*, 2 Phillim. 324; (*i*) *Atter v. Atkinson*, 1 Pr. & Div. Jones v. Godrich, 5 Moo. P. C. 16; 665.

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with his execution thereof will, as a general rule, be sufficient to show that he approved as well as knew the contents thereof (*j*). But circumstances may exist which may require that something further shall be done in the matter than the mere establishment of the fact of the testator having been a person of sound mind and capacity, and also of his having had read over to him that which had been prepared for him, and which he executed as his will. There is no unyielding rule of law (especially when the ingredient of fraud enters into the case) that when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all further inquiry is shut out (*k*).

The exercise of undue influence may be a ground for the interposition of the Court to set aside a will. Though a man may have a mind of sufficient soundness and discretion to manage his own affairs in general, still, if such a dominion or influence be obtained over him as to prevent his exercising that discretion in the making a will, he cannot be considered as having such a disposing mind as will give it effect (*l*).

In cases of weakness of mind arising from the near approach of death or otherwise, strong evidence may be required that the contents of the will were known to and approved by the testator executing the will at such time (*m*), and that the execution was his spontaneous act (*n*).

When it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges it (*o*), or at least he must show facts from which the Court would be justified in treating the circumstances attending the bounty as suspicious. Further, in order to set aside the will of a person of sound mind, it is not sufficient to show that the

(*j*) *Guardhouse v. Blackburn*, ib. 116.

(*k*) *Fulton v. Andrew*, 7 E. & I. App. Ca. 469.

(*l*) *Mountain v. Bennett*, 1 Cox, 355.

(*m*) *Mitchell v. Thomas*, 6 Moo. P. C. 137; *Durnell v. Corfield*, 1 Roberts, 63; 8 Jur. 915.

(*n*) *Tribe v. Tribe*, 13 Jur. 793.

(*o*) *Boyse v. Russborough*, 6 H. L. 2, 49.

circumstances attending its execution are consistent with the hypothesis that it was obtained by undue influence, it must be shown that they are inconsistent with a contrary hypothesis (*p*).

A distinction exists between the influence which is held to be undue in the case of transactions *inter vivos*, and that which is called undue in relation to a will. In the first place, in the case of gifts or contracts *inter vivos*, there is a transaction in which the person benefited at least takes part, whether he unduly urges his influence or not, and in calling on him to explain the part he took, and the circumstances that brought about the gift or obligation, the Court is plainly requiring of him an explanation within his knowledge. But in the case of a legacy under a will, the legatee may have and in general has no part or even knowledge of the act; and to cast on him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence, or with what motives the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many, if not in most, cases he could not possibly discharge. Another distinction is this. In the case of gifts or transaction *inter vivos*, it is considered that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are therefore set aside, unless the party benefited can show affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment. The law regarding wills is very different. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy so long as the testator thoroughly understood what he is doing and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of these claims in a legacy, provided that persuasion stop short of coercion, and that the

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volition of the testator, though biassed and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another (q).

“The influence which will set aside a will,” said Mr. Justice Williams (r), “must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion, by importunity which could not be resisted—that it was done merely for the sake of peace, so that the motive was tantamount to force and fear.” To the same effect were the words of Lord Penzance in charging a jury with respect to what shall constitute undue influence in the making of a will, in *Hall v. Hall* (s): “To make a good will a man must be a free agent, but all influences are not unlawful. Persuasion appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like—these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has not the courage to resist; moral command asserted and yielded for the sake of peace and quiet or of escaping from distress of mind or social discomfort; these, if carried to a degree in which the free play of the testator’s judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, not driven, and his will must be the offspring of his own volition and not that of another” (t). In a case, accordingly, where the plaintiff, a Roman Catholic priest, had resided with the testatrix and her husband many years as chaplain, and for a

(q) *Parfit v. Lawless*, 2 Pr. & Div. 469.

(r) *Executors and Administrators*, Book 2, Ch. 1, s. 2.

(s) 1 Pr. & Div. 482.

(t) See *Kinleside v. Harrison*, 2 Phillim. 551; *Baker v. Batt*, 2 Moo. P. C. 321.

part of the time as confessor, and was confessor at the time the will in dispute was made, but there was no evidence that the plaintiff had interfered in the making of the will, or that he had procured the gift of the residue to himself, or that he had brought such gift about by coercion or dominion exercised over the testatrix against her will or by importunity not to be resisted, it was held that there was no evidence to go to the jury on the issue of undue influence (*u*). So, also, a solicitor may take a benefit under the will of a client, although he may himself have prepared it, if no undue influence has been exerted by him over the testator (*x*). So, also, a bequest of the bulk of her property by an old woman to her medical attendant (who was a stranger to her in blood, and in whose house she resided) was upheld, though many of the acts of the medical man with respect to the property deserved serious reprobation; none of them, however, being so connected with the will as to justify the Court in deciding that the execution of the will was procured by means which the law holds to be fraudulent (*y*).

The difficulty of defining the point at which influence over the mind of a testator becomes so pressing as to be properly described as coercion is greatly enhanced when the question is one between husband and wife (*z*).

The influence to be undue within the rule of law which would make it sufficient to vitiate a will may be exercised by means of fraud. "If," said Lord Cranworth, in *Boyse v. Russborough* (*a*), "a wife by falsehood raises prejudice in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relations to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivances may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impres-

(*u*) *Parfit v. Lawless*, 2 Pr. & Div. 472.

(*x*) *Paske v. Ollatt*, 2 Phillim. 323; *Barry v. Butlin*, 2 Moo. P. C. 480; *Walker v. Smith*, 29 Beav. 394.

(*y*) *Jones v. Godrich*, 7 Moo. P. C. 16. See *Greville v. Tylec*, ib. 320.

(*z*) *Boyse v. Russborough*, 6 H. L. 48.
(*a*) 6 H. L. 49.

sions thus kept alive" (b). So, also, the revocation of a will procured by false and fraudulent representations respecting the character and conduct of a legatee, when made for the purpose of imposing on a testator and inducing him to revoke the bequest in favour of the person calumniated, is void (c).

Relief also will be given in equity on the ground of fraud, if a testator be induced to omit the insertion in his will of a formal provision for any intended object of his bounty, upon the faith of assurances, given by his heir or other person who would take his property in the event of his omitting to insert the particular bequest in his will, that his, the testator's, wishes shall be executed as punctually and as fully as if the bequest were formally made (d). An engagement of a like nature may be entered into not only by words but may be inferred from conduct (e). The case of course will be much the stronger if the insertion of the provision be prevented by physical interference on the part of the interested person (f).

To invalidate a will on the ground of fraud or undue influence it must be shown that they were practised with reference to the will itself, or so contemporaneously with the will or connected with it as by almost necessary presumption to affect it (g). But where it appears that at or near the time when the will sought to be impeached was executed, the testator was in other important transactions so under the influence of the person benefited by the will that as to him he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised (h).

An issue whether a will was obtained by fraud ought not to be submitted to a jury unless there is reasonable evidence: 1, that

(b) *Comp. Browning v. Budd*, 6 Moo. P. C. 430.

(c) *Allen v. Macpherson*, 1 H. L. 207; *Lord Longford v. Purdon*, 1 L. R. I. 82.

(d) *Russell v. Jackson*, 10 Ha. 213; *McCormick v. Grogan*, 4 E. & I. App. Ca. 88.

(e) *Ib.*; *Paine v. Hall*, 18 Ves. 475.

(f) *Dixon v. Olmius*, 1 Cox, 414.

(g) *Jones v. Godrich*, 5 Moo. P. C. 40.

(h) *Boyse v. Russborough*, 6 H. L. 51. See *Parfit v. Lawless*, 2 Pr. & Div. 472.

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fraud had been practised ; 2, that its influence continued so that the testator was labouring under it at the time he made his will ; 3, that he was by that means induced to make his will (*i*).

Nor ought an issue whether a will was obtained by undue influence to be submitted to a jury unless there is reasonable evidence: 1, that the person charged had influence over the testator; 2, that he exercised that influence over the testator to the extent of coercion in relation to the will itself; 3, that the execution of the impeached instrument was procured by the exercise of such influence as the *causa causans* of the act itself (*k*).

It lies on the person who brings the charge to prove it by direct or circumstantial evidence. Circumstantial evidence is enough, for a jury is at liberty to infer undue influence, not as matter of surmise, but if the evidence leaves no other rational hypothesis on which the conduct of the testator can be accounted for (l).

SECTION II.—FRAUD UPON POWERS.

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A class of frauds against which courts of equity will relieve, are frauds upon powers.

There is a fraud upon a power if a man, having a power of appointment, corruptly exercises the power with a view to his own personal benefit and advantage. An appointment under a power, accordingly, will be set aside in equity if it appears that the person in whose favour the power has been exercised has agreed or stipulated to give the donee of the power some benefit or advantage in the event of the power being exercised in his favour (*m*), or if the circumstances of the case attending the execution of the power are such as to show conclusively that

(i) *Lord Longford v. Purdon*, 1 L. R. L. 75.

(k) Ib.

(l) *Barry v. Butlin*, 2 Moo. P. C. 491; *Lord Longford v. Purdon*, 1 L. R. I. 80.

(m) *Lane* v. *Page*, Ambbl. 233 ;

Palmer v. Wheeler, 2 Ba. & Be. 31 ;
Farmer v. Martin, 2 Sim. 511 ;
Arnold v. Hardwick, 7 Sim. 343 ;
Jackson v. Jackson, 7 Cl. & Fin. 977 ;
Rowley v. Rowley, Kay, 242 ; *Reid v.*
Reid, 25 Beav. 478. See *Askham v.*
Barber, 17 Beav. 44.

the appointment was made with a view to some profit ultimately accruing to the donee of the power (*n*); as, for instance, where a parent, having a power of appointment among children, exercises it in favour of a son, a lunatic, in very bad health and likely to die, in which event the parent would of course become entitled to the fund, as the personal representative of the son (*o*). So, also, and for the same reason, where a parent having power to raise portions for children, appointed a portion to a child in a delicate state of health long before it was required, and the child died shortly afterwards, the appointment was held invalid (*p*). So, also, an appointment by a parent in favour of a daughter, with a view to obtaining the benefit of the fund so appointed, through the exercise of undue parental influence over her, would be held invalid (*q*).

Under a power to appoint to children a fund actually set apart or provided, sharès may be appointed to a child so as to vest long before they are required. A *bonâ fide* appointment to a child of very tender age, and in good health, of an estate or fund which has been previously set apart or provided for the benefit of children is in itself no sign of fraud. It is of no consequence that the child may die shortly afterwards, if it was in good health at the time the power was exercised. If the power be in other respects well executed, it is immaterial that it may have in fact been exercised with the object of providing that in any event the persons entitled in remainder on failure of children shall not take the estate or fund (*r*).

Where the donee of a power of raising portions for the benefit of children has under the terms of the power clear authority to fix the times at which portions shall vest, and appoints a portion to vest immediately, the Court will not hold the appointment invalid as a fraud upon the power, because in the events which have happened the donee of the power has

(*n*) *Humphrey v. Olver*, 28 L. J. Ch. 406. See *Cooper v. Cooper*, 8 Eq. 312, 5 Ch. 203; *Duggan v. Duggan*, 7 L. R. I. 155.

(*o*) *Wellesley v. Mornington*, 2 K. & J. 143.

(*p*) *Lord Hinchinbrooke v. Sey-*

mour, 1 Bro. C. C. 395. See *Henty v. Wrey*, 21 Ch. D. 332.

(*q*) *Re Marsden's Trusts*, 4 Drew. 601.

(*r*) *Butcher v. Butcher*, 14 Sim. 444; *Fearon v. Desbrisay*, 14 Beav. 635.

obtained a benefit from its exercise. In a case, accordingly, where a parent having such a power exercised it in favour of three daughters of tender age, it was held that the mere fact that the portions were appointed so that upon the death of the children the father took the benefit of their shares as next of kin was not of itself sufficient to induce the Court to set aside the appointment as a fraud on the power (s). It would be otherwise, however, if there were evidence to show that the early death of any of the children might have been reasonably expected (t).

"The results," said Lord Justice Lindley, in *Henty v. Wrey* (u) "at which I have arrived from a careful examination of all the authorities are as follows:—First, that powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorize appointments vesting those portions in the appointees before they want them, that is, before they attain twenty-one, or, if daughters, marry; secondly, that when, on the true construction of the power and the appointment, the portion has not vested in the lifetime of the appointee, the portion is not raisable, but sinks into the inheritance; thirdly, that when the language is clear and unambiguous, effect must be given to it; fourthly, that when, upon the true construction of both instruments, the portion has vested in the appointee, the portion is raisable, even although the appointee dies under twenty-one, or, if a daughter, unmarried; fifthly, that appointments vesting portions charged on land in children of tender years who die soon afterwards are looked at with suspicion, and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that, without some additional evidence, the Court cannot do so."

The fact that the donee of the power may derive a benefit under the appointment does not necessarily render the appointment invalid (x).

If the object of the appointment be to secure a benefit for

(s) *Henty v. Wrey*, 21 Ch. D. 332.

(x) *Beere v. Hoffmeister*, 23 Beav.

(t) *Ib.*

101.

(u) 21 Ch. D. 359.

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all the objects of the power, the appointment is good, though the appointor may to some extent participate in such benefit (*y*). Thus, in a case where it was urged that certain appointments (made by a tenant for life acting under a power given by a marriage settlement), the object of which was to effect building leases were for the benefit of the appointor, and therefore, not being authorized by the settlement, were invalid, the Court considered that this principle should give way when the benefit of the appointment extended to parties in interest. The building leases had indeed benefited the tenant for life but they had also benefited the other interested parties in the improved value of the property, which they would lose if the appointment were declared void. To hold otherwise would be to strain a rule intended to benefit the objects of the power to a rigid exactness which would inflict manifest injury to them (*z*).

So, also, where a father, having a power of appointment over a fund in favour of children, on the marriage of a daughter appointed a share to her to be held upon the trusts declared by her marriage settlement, and by the settlement the fund so appointed was limited for the benefit of the husband and wife during their respective lives and then for the benefit of children, with an ultimate trust in default of children for the father, his executors, administrators, and assigns, it was held that the appointment was not in fraud of the power (*a*). "The transaction," said Lord Hatherley (*b*), "is a virtuous and proper transaction, in which the father takes care that the interests of the children shall be protected, and simply protects the property against the marital right, which would otherwise transfer it altogether from the source from which it came, and he puts it back into the channel in which it was at the time of the marriage."

If a person be the only child who has been kind to a parent in distress, there is no fraud if the parent exercises a power of appointment in his favour (*c*). Nor is there fraud if a parent exercises a power of appointment in favour of two of

(*y*) *Re Huish's Charity*, 10 Eq. 5.

(*z*) *Ib.*

(*a*) *Cooper v. Cooper*, 5 Ch. 212.

(*b*) *Ib.*

(*c*) *Wheeler v. Palmer*, 2 Ba. & Be.

his sons to enable them to embark in business, and then, at their request, becomes a partner with them in the business, there being no evidence to prove any bargain between them in the event of his exercising the power in a particular way (*d*). An appointment, however, to one of several objects of a power in payment of a debt due to him from the appointor is bad (*e*).

Although an appointment by a parent in favour of a child, over whom he exercises undue influence, cannot be supported (*f*), it is otherwise if the exercise of undue influence be disproved (*g*). A child to whom property has been appointed by a parent may, in such a case, give the parent a benefit or advantage in the property so appointed (*h*).

In an arrangement settling the interests of all the branches of a family, children may contract with each other to give to a parent, who had power to distribute property among them, some advantage which the parent, without their contract with each other, could not have (*i*).

In order, however, to constitute a fraud upon a power, it is not necessary that the object of the exercise of the power should be the personal benefit or advantage of the donee of the power. If the design of the donee in exercising the power is to confer a benefit, not upon himself actually, but upon some other person not being an object of the power, that motive just as much interferes with and defeats the purpose for which the power was created as if it had been for the personal benefit of the donee himself. If the donee of a power of appointment exercises the power in favour of one of several objects of the power, with a view to the benefit of a stranger, the appointment is fraudulent and void, even although the motive of the donee is not morally wrong (*k*). A man who takes property absolutely under an appointment may do with the property so appointed as he pleases,

(*d*) *Cockroft v. Sutcliffe*, 2 Jur. N. S. 323.

(*e*) *Reid v. Reid*, 25 Beav. 478. See *Beddoes v. Pugh*, 26 Beav. 411.

(*f*) *Re Marsden's Trusts*, 4 Drew. 601. See *Topham v. Duke of Portland*, 1 D. J. & S. 517.

(*g*) See *supra*, p. 157.

(*h*) *Davis v. Uphill*, 1 Sw. 136; *Wardle v. Dickson*, 5 Jur. N. S. 699.

(*i*) *Davis v. Uphill*, 1 Sw. 136.

(*k*) *Re Marsden's Trusts*, 4 Drew. 601.

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and may settle it on persons who are not objects of the power (*l*); but there is a fraud upon a power if an appointment be made upon a bargain for the benefit of persons who are not objects of the power (*m*). The appointment, accordingly, of a portion of a fund to a daughter, for the purpose of paying her husband's debts, was held void (*n*). So also, where a married woman, having a power to appoint a fund of which she received the income for her life, appointed the whole fund at her death absolutely in favour of her daughter, in order that thereout the daughter should benefit the father, the appointment was held invalid (*o*). The principle has been held even to apply to a case where an arrangement was entered into between the original donor and creator of the power and any of the objects of the power, to benefit persons other than those within the power (*p*). The principle that the donee of a power may not appoint to a person who is not an object of the power applies even although the appointee is not privy to the intentions of the donee of the power. The design to defeat the purpose for which the power was created will stand just the same whether the appointee was aware of it or not (*q*). Where, accordingly, a married woman, having a power to appoint a fund of which she received the income for her life among her children, appointed the whole fund at her death in favour of her daughter in order that thereout the daughter should benefit her father, relying on the influence which the father would have over her to carry out the secret arrangement, the appointment was held invalid, although the daughter was not informed of the mother's intention until after her mother's death (*r*).

The fact, however, that under the provisions of an appointment, whether such provisions appear on the face of the instrument itself or are to be gathered from intrinsic evidence, some

(*l*) *Routledge v. Dorrill*, 2 Ves. Jr. 601.

357. See *Birley v. Birley*, 25 Beav. 299.

(*m*) *Birley v. Birley*, ib.; *Pryor v. Pryor*, 2 D. J. & S. 205.

(*n*) *Ranking v. Barnes*, 12 W. R. 568.

(*o*) *Re Marsden's Trusts*, 4 Drew.

(*p*) *Lee v. Fernie*, 1 Beav. 483.

(*q*) *Re Marsden's Trusts*, 4 Drew. 601; *Topham v. Duke of Portland*, 5 Ch. 61.

(*r*) *Ib.* See *Ranking v. Barnes*, 12 W. R. 568.

persons who are not objects of the power may take interests in the appointed fund either in conjunction with or in succession to persons who are objects of the power is not of itself sufficient to invalidate the appointment (*s*).

If there is nothing on the face of the transaction or in the evidence to indicate that the appointment was made with the intention of benefiting the donee of the power, or that it was other than part of a fair and reasonable division of the property of a father among his children, the appointment is not invalid, though the effect may be to confer a benefit, not only upon the donee, but also upon others who were not objects of the power (*t*).

Although children may contract with each other to give to a parent, who has power to distribute property among them, some advantage which the parent, without their contract with each other, would not have (*u*), a transaction of the sort cannot be upheld if, taken as a whole, it appears not to be a *bonâ fide* family arrangement, but to have been entered into in fraud of the power, for the purpose of giving a benefit to a person who was by the donor excluded from being an appointee or from deriving any advantage from the exercise of the power (*x*).

There is a fraud upon a power, not only where it is exercised in favour of persons who are not the proper objects of the power, but also where it is exercised for purposes foreign to those for which the power was created (*y*). The donee of the power shall, at the time of the exercise of the power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any object which is beyond the purpose and intent of the power (*z*). It is, accordingly, a fraud upon a power, if a man having a power to appoint among two sisters appoints the

(*s*) *Roach v. Trood*, 3 Ch. D. 440,
per Baggallay, J.

(*t*) *Roach v. Trood*, 3 Ch. D. 440.

(*u*) *Davis v. Uphill*, 1 Sw. 136.

(*x*) *Agassiz v. Squire*, 18 Beav.
431.

(*y*) *Topham v. Duke of Portland*, 1
D. J. & S. 570.

(*z*) *Duke of Portland v. Topham*,
11 H. L. 54, per Lord Westbury, 5
Ch. 60; *Duggan v. Duggan*, 7 L. R.
1. 155.

whole to one of them, it being understood that she was only to receive one moiety of the fund to her own use, and was to allow the other to accumulate, subject to some future arrangement (*a*). In determining whether there is a fraud upon a power, the Court looks to the purpose with which the power was exercised (*b*). In *Scroggs v. Scroggs* (*c*), the consent of a trustee was necessary to the exercise of a power, and the donee of the power procured the trustee's consent by a false representation, to which the appointee does not appear to have been in any way a party; yet the Court set aside the appointment (*d*).

Any attempt to exceed the limitations of a power through the medium of any appointment to one of the objects of it in exclusion of the other is equally invalid, whether the purpose of the donee be selfish or, as he supposes, a more beneficial mode of effecting that which he takes the donor of the power to have desired. The Court will not allow him to interpret the donor's intention in any other sense than the Court itself holds to be the true construction of the instrument creating the power, and a literal execution of the power with a purpose which it does not sanction is regarded as a fraud on the power (*e*).

If there be a fraudulent arrangement between the donee of a power and the appointee, the bad purpose will, in general, vitiate the appointment *in toto*, and not merely the part to which the fraud extends (*f*). Appointments to children, accordingly, in part fraudulent, have almost always been avoided altogether (*g*). In cases, however, where the evidence enables the Court to distinguish what is attributable to an authorised from what is attributable to an unauthorised purpose, the bad purpose will not affect the whole appointment (*h*). So when

(*a*) *Ib.* 32.

(*b*) *Topham v. Duke of Portland*,
1 D. J. & S. 570, 5 Ch. 60.

(*c*) *Amb.* 272.

(*d*) *Per* Turner, L. J., 1 D. J. &
S. 570.

(*e*) *Topham v. Duke of Portland*, 5
Ch. 59.

(*f*) *Daubeny v. Cockburn*, 1 Mer.

626.

(*g*) *Ib.*; *Farmer v. Martin*, 2 Sim.
511; *Arnold v. Hardwicke*, 7 Sim.
343. See *Rowley v. Rowley*, Kay, 259.

(*h*) *Topham v. Duke of Portland*, 1
D. J. & S. 572, *per* Turner, L. J.
See *Carver v. Richards*, 27 Beav.
488; *Ranking v. Barnes*, 12 W. R.
565.

there is a sum of money to be appointed among children, although an appointment to one child may be void on account of a corrupt agreement, an appointment to another child, although by a contemporaneous deed, if it can be severed from the previous appointment so as not to form part of the same transaction, will be valid (*i*).

Although in the case of appointments to children, a fraudulent arrangement between the donee of the power and the appointee will, in general, vitiate the whole appointment, a different doctrine has been maintained in the case of appointments by way of jointure. The appointment will, in such cases, be only vitiated to the extent to which it is affected by the fraud (*k*).

The legitimate purpose of a power of sale in a mortgage being to secure the repayment of the money advanced in the mortgage, if the mortgagee uses the power for another purpose, either from an ill motive to effect other purposes or to serve the purposes of individuals, the Court considers that to be a fraud in the exercise of the power, because it is using the power for purposes foreign to that for which the power was intended (*l*). But if he exercises the power of sale for the purpose of realising his debt and without collusion with the purchaser, the Court will not interfere, even though the sale be disadvantageous, unless the price be so low as to be evidence of fraud (*m*).

It was formerly held that illusory appointments under a power were void in equity, *e. g.*, appointments of a nominal instead of a substantial share to one of the members of a class where power was given to appoint among them all. An appointment of this kind was always valid at law, and it would perhaps be difficult to reconcile with principle its avoidance in equity. The doctrine has been abolished by statute (*n*).

- (*i*) *Rowley v. Rowley*, Kay, 242. (*l*) *Robertson v. Norris*, 1 Giff. 421.
See *Harrison v. Randall*, 9 Ha. 397. (*m*) *Warner v. Jacob*, 20 Ch. D.
(*k*) *Lane v. Page*, Amb. 233; 220.
Alegn v. Belcher, 1 Eden. 138, Sug. (*n*) 11 Geo. 4 & 1 Wm. 4, c. 46;
Pow. 610. See *Rowley v. Rowley*, *Re Capon's Trust*, 10 Ch. D. 484.
Kay, 259.

SECTION III.—FRAUD IN THE PREVENTION BY UNDUE
MEANS OF ACTS TO BE DONE FOR THE BENEFIT OF
THIRD PARTIES.

There is fraud against which a Court of Equity will relieve, if a man be prevented by undue means from doing an act for the benefit of third parties. If a man be prevented by duress, undue influence, or other undue means, from executing an instrument, the Court will treat it as if it had been executed (*o*). When, for instance, a tenant in tail, meaning to suffer a recovery, was prevented on his deathbed from suffering it, by the fraud of the person whose wife was entitled in remainder, it was held that the estate ought to be held as if the recovery had been perfected, though even in favour of a volunteer, and against one not a party to the fraud (*p*). So also when a person interested in the non-execution of a power has the deed creating the power in his custody, and the donee of the power, wishing to execute it, sends for the deed, which the party refuses to deliver, and thereupon the donee does an act with an intent to execute the power, equity will uphold the execution, although defective by reason of the fraud in the person who was to have the benefit of the original settlement (*q*). But the mere refusal or neglect of an attorney with whom a deed containing a power has been deposited to deliver it up to the donee of the power, in the absence of fraud, is no ground for relief against informality (*r*). Equity would extend the relief to a case where a wife, having a power of revocation over an estate vested in her husband, is desirous to exercise it, but the husband hinders anybody from coming to her, or prevents the execution, or obstructs the engrossing of the deed of revocation (*s*).

(*o*) *Middleton v. Middleton*, 1 J. & W. 96.

(*p*) *Luttrell v. Olmuis*, cit. 11 Ves. 638, 14 Ves. 290, 1 J. & W. 96.

(*q*) See 3 Ch. Ca. 67, 83, 84, 89, 93, 108, 122; *Ward v. Booth*, cit. 3 Ch. Ca. 69. See Fort. 383; *Buckell v. Blenkhorn*, 5 Ha. 131; *West v.*

Ray, Kay, 385.

(*r*) *Buckell v. Blenkhorn*, 5 Ha. 131.

(*s*) *Piggott v. Pearice*, Com. 250, Prec. Ch. 471; *Vane v. Fletcher*, 1 P. Wms. 354; *Segrave v. Kirwan*, Beatt. 157; *Bulkeley v. Wilford*, 2 Cl. & Fin. 102; *Nanney v. Williams*, 22 Beav. 452.

The principle applies to cases where a man has been induced by false promises to abstain from doing an act for the benefit of third parties. If, for example, a testator be induced to omit the insertion in his will of a formal provision for any intended object of his bounty upon the faith of assurances given by his heir or other person, who would take his property in the event of his omitting to insert the particular bequest in his will, that his, the testator's, wishes shall be executed as punctually and fully as if the bequest were formally made, this promise and undertaking will raise a trust, which, though not available at law, will be enforced in equity on the ground of fraud (*t*). So, also, if a father devises an estate to one son who engages if the estate is devised to him to give a certain amount of money to another son, the promise will be enforced in equity (*u*). An engagement to the same effect may be entered into, not only by words, but by silent assent, or may be inferred from conduct so as equally to raise a trust (*x*).

SECTION IV.—FRAUDULENT SUPPRESSION OR DESTRUCTION OF DEEDS AND OTHER INSTRUMENTS IN VIOLATION OF OR INJURY TO THE RIGHTS OF OTHERS.

If an heir should suppress deeds, wills, &c., in order to prevent another party, as grantee or devisee, from obtaining the estate vested in him thereby, Courts of Equity, upon due proof by other evidence, would grant relief and perpetuate the possession and enjoyment of the estate in such grantee or devisee (*y*). If the

(*t*) *Dutton v. Pool*, 1 Vent. 318; *Thynn v. Thynn*, 1 Vern. 296; *Sel-lack v. Harris*, 5 Vin. Ab. 521; *Devenish v. Buines*, Prec. Ch. 3; *Oldham v. Litchfield*, 2 Vern. 506, 2 Freem. Ch. 284; *Chamberlaine v. Chamberlaine*, 2 Freem. Ch. 34; *Reech v. Kennigate*, Amb. 67; *Barrow v. Greenough*, 3 Ves. 153; *Mestacr v. Gillespie*, 11 Ves. 638; *Chamberlaine v. Agar*, 2 V. & B. 262; *Podmore v. Guanning*, 7 Sim. 660; *Russell v.*

Jackson, 10 Ha. 213; *McCormick v. Grogan*, 4 E. & I. App. Ca. 88.

(*u*) *Stückland v. Aldridge*, 9 Ves. 519; *McCormick v. Grogan*, 4 E. & I. App. Ca. 88.

(*x*) *Byrne v. Golfrey*, 4 Ves. 10; *Paine v. Hall*, 18 Ves. 475; *McCormick v. Grogan*, 4 E. & I. App. Ca. 88.

(*y*) *Hunt v. Matthews*, 1 Vern. 408; *Wardour v. Berisford*, ib. 452, cit. 2 P. Wm. 748, 749; *Dalston v.*

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contents of a suppressed or destroyed instrument are proved, the party will receive the same benefit as if the instrument were produced (z).

No valid instrument which effectually conveys property can lose its effect merely by reason of its fraudulent cancellation or destruction (ū).

Where there has been a spoliation or suppression of instruments, which might have thrown light upon a suit, everything will be presumed against the party by whose agent such spoliation and suppression have been practised, and every presumption will be made in favour of the *primâ facie* rights of the other party (b).

Primâ facie the cancellation of a deed is evidence of its discharge, but in a Court of Equity it is open to the party claiming under the deed, to show that it was cancelled by fraud, mistake, or accident. Where the deed has always been in the hands of the party beneficially interested under it, should it appear to have been cancelled, the proof that this was done by fraud would rest with that party; but where the deed has constantly remained in the power of the maker thereof, or has been deposited by him with a person of his own selection, circumstances may throw upon the maker of the deed the *onus* of showing, not only that such deed is cancelled, but that the obligation it imposed has been duly discharged and satisfied (c).

SECTION V.—FRAUD IN THE PROCUREMENT OF THE EXECUTION OF A DEED.

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No man will be permitted to take advantage of a deed which he has fraudulently induced another to execute that the former

1 *Coatsworth*, P. Wms. 731; *Finch v. Newnham*, 2 Vern. 216; *Barnesley v. Powell*, 1 Ves. 289; *Tucker v. Phipps*, 3 Atk. 360. See *Hornby v. Matcham*, 16 Sim. 325.

(z) *Saltera v. Melhuish*, Amb. 247;
Cowper v. Cowper, 2 P. Wms. 719.
(a) *Donaldson v. Gillott*, L. R. 3

Eq. 277.

(b) *Bowles v. Stuart*, 1 Sch. & Lef. 222; *Eyton v. Eyton*, 1 Bro. P. C. 153; *Hampden v. Hampden*, ib. 252; *Sepalino v. Twitty*, Sel. Ca. Ch. 76.

(c) *Slaysken v. Hunter*, 1 Mer. 45.

may commit an offence against morality, to the injury or loss of the party by whom the deed is executed (*d*). Thus, where a married woman obtains a separation deed from her husband, with pecuniary allowance, for the purpose of enabling her the more effectually to carry on an adulterous intercourse with another, the Court will, on the petition of the husband, order that the deed be delivered up to be cancelled (*e*), and proof of subsequent adultery with a person with whom the wife had sexual intercourse before marriage, and had continued on terms of improper intimacy afterwards, seems to be sufficient evidence that such a deed was obtained for the fraudulent purpose of promoting the adultery (*f*). But such a deed will not be set aside for adultery previously committed; nor will a marriage settlement be annulled on the ground that the wife has concealed from her husband the fact of previous incontinence, though he alleges that he would not have married her had he known it. The case may, however, be different where there is proof that an unchaste woman conspired with others, by fraudulent misrepresentations, to pass herself off as a virgin, and so get married (*g*).

SECTION VI.—FRAUD IN SETTING UP AN INSTRUMENT OBTAINED FOR ONE PURPOSE FOR ANOTHER PURPOSE.

Where a man obtains an instrument or conveyance from another in order to answer one particular purpose, but afterwards makes use of it for another, a Court of Equity will relieve under the head of fraud. It is immaterial that the conveyance may be perfected by act of record (*h*). Where, accordingly, a father, who was tenant for life of real estate, fearing that the husband of his daughter, who was tenant in tail of the property, would waste the property, induced him and the daughter to join in a recovery with a view to protecting the property from his creditors, and the property was conveyed to the father for a mere

(*d*) *Evans v. Carrington*, 2 D. F. & J. 481.

(*e*) *Ib.*

(*f*) *Ib.*

(*g*) *Ib.*

(*h*) *Young v. Peachey*, 2 Atk. 256.

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nominal sum, the recovery was set aside at the suit of the assignees in insolvency of his son-in-law (*i*).

SECTION VII.—FRAUD IN ASSIGNMENTS, BY ASSIGNEES, ETC.

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An assignment by the assignee of a lease or term is not a fraudulent assignment. If a man assign nominally only, retaining the beneficial enjoyment, it is fraudulent, because while he assumes to do one thing he really does another. He retains the benefit, and by a false act endeavours to get rid of the burthen. But if he assigns really, getting rid of the burthen and giving up really the benefit also (if any) to his assignee, it is not a fraudulent act. His motive for parting with it or the other's motive for receiving it are not enough to make it fraudulent, if the act done be a real act, intended really to operate as it appears to do. The assignment even to a beggar is not fraudulent, although made in order to avoid payment of a sum of money chargeable on the property under the original agreement. The motive which induces the assignee to assign over has no bearing upon the question whether the assignment is fraudulent or not, provided the assignment is real and intended to operate, as it appears to operate (*k*).

Where the assignee of a lease, subject to a mortgage, induced the lessor, a friend and client, to take advantage of a forfeiture, which was committed by the lessee expressly for that purpose, and, after the forfeiture was complete, induced the lessor to grant him a new lease of the property on the same terms, the Court declared that the new lease was subject to the mortgage (*l*).

(*i*) *Ib.* See *Wilkinson v. Brayfield*, 2 Vern. 307; *Goodricke v. Brown*, 2 Freem. 180, 1 Ch. Ca. 49; *Evans v. Bicknell*, 6 Ves. 191; *Pickett v. Loggon*, 14 Ves. 234.

(*k*) *Taylor v. Shum*, 1 B. & P. 21; *Onslow v. Corrie*, 2 Madd. 340; *Fagg v. Dobie*, 3 Y. & C. 103.

(*l*) *Hughes v. Howard*, 25 Beav. 575.

SECTION VIII.—FRAUD BY AND UPON COMPANIES.

Fraud which consists in misrepresentation or concealment on the part of companies has been already considered; but there are other acts on the part of companies which are fraudulent in the contemplation of a Court of Equity.

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The creditor of a company who has recovered judgment against the company may, unless in the case of companies within the Companies Act, 1862 (*m*), proceed to execution at his pleasure against any particular shareholder (*n*); but if a company enter into an agreement with one of its creditors that he shall recover judgment against the company, and take out execution against a particular shareholder, there is fraud, against which relief may be had in equity (*o*). The rule that a partner cannot buy in a debt and enforce it against his copartners applies equally as between shareholders in joint stock companies (*p*).

A shareholder in a company acting *bond fide* may sell his shares to another person or give him money to take the shares, if the transaction be open and not merely colourable; but if a shareholder gets rid of his shares by assigning them to a pauper or person of no substance, or to a person over whom he has entire control, in order to avoid paying his share of the debts of the company, and to throw them upon the other shareholders, the transaction is fraudulent (*q*), and the name of the transferee will be struck off the list of shareholders, and that of the shareholder replaced on the register (*r*).

A shareholder of a company entitled to transfer his shares with the approval of the directors is bound to procure a transferee, whom he knows to be a person fitted by position and

(*m*) 25 & 26 Vict. c. 89, ss. 85, L. 297.
201.

(*n*) *Green v. Nixon*, 23 Beav. 530;
Beck v. Dean, 3 Jur. N. S. 14.

(*o*) *Taylor v. Hughes*, 2 J. & L.
24; *Fernihough v. Leuder*, 15 L. J.
Ch. 458, 4 Ra. Ca. 373; *Horn v.*
Kilkenny, &c., Railway Co., 1 K. &
J. 399; *Bargate v. Shortridge*, 5 Il.

(*p*) *Woodhams v. Anglo-Aus-*
tralia, &c., Co., 2 D. J. & S. 162.

(*q*) *Slater's Case*, 35 Beav. 293;
Chynoweth's Case, 15 Ch. D. 20. See
Stannaries Act, 32 & 33 Vict. c. 19,
ss. 25, 35.

(*r*) *Kintrea's Case*, 5 Ch. 95;
Payne's Case, 9 Eq. 223.

solvency to become a co-partner with the other shareholders. If he should propose for the approval of the directors a transferee whom he or his agent in the transaction knew or could have known to be an unfit person to become a shareholder, the approval of the transferee may be no bar to keeping the transferor on the list of contributories (s).

The power given to directors of a company to approve or disapprove of a proposed transferee of shares is given to them for the benefit of the shareholders, whose interest it is that all members of the company should be capable of meeting liability on their shares. Every shareholder of a company proposing a transferee of his shares is bound to give such information respecting him as will enable the directors to arrive at a correct decision, and if by misrepresentation or concealment they are induced to approve of an unfit person as transferee, the transfer will be set aside (t), and the name of the transferor will be replaced on the register instead of the transferee. The fact that the directors may have approved of the transfer under threat of legal proceedings in case of refusal, and that they had acquiesced in the transfer for seven months after becoming aware of the truth, is not sufficient to protect the transfer (u).

In a case in which it was shown that the directors of a company had postponed making a call in order to enable one of their number to transfer his shares to a person of no substance, and to get the transfer registered, it was held that the transfer was of no avail (v).

When there is a transfer of shares, the transferor will be held a contributory, if the evidence shows, not only that the transfer was made to get rid of liability, but that it was not a real transaction, and was not intended to divest the interest of the transferor, and to render the transferee the *bonâ fide* owner of the shares, but that the transferee held them subject to the order of the transferor. The Court has held that a transaction of this

(s) *Re European Assurance Arbitration, Murgutroyd's Case*, 18 Sol. J. 28.

(t) *Re European Assurance Society Arbitration, Simpson's Executors'*

Case, 17 Sol. J. 648 ; *William's Case*, 18 Sol. J. 84 ; *Musket's Case*, 18 Sol. J. 202.

(u) *Ib.*

(v) *Gilbert's Case*, 5 Ch. 559.

kind, which is a sham, a fraud, produces no effect whatsoever, and it restores the transferor who has resorted to such a device, to the position in which he was before the device was resorted to. But if shares are purchased in the open market and transferred by the direction of the purchaser to a nominee of no substance for the purpose of escaping liability, the name of the purchaser cannot, when the company is wound up, be placed on the list of contributories (*x*).

If the directors of a company enter into an arrangement with a shareholder, that on payment of a certain sum of money his shares shall be forfeited, and the arrangement is not within the power of the directors, it is a fraud upon the other shareholders, inasmuch as it deprives them of one of those for whose just liability with themselves they had originally stipulated, and in the event of a winding up, his name will be replaced on the list of contributories (*y*).

Where, under a power in the articles of association to receive payment of calls in advance, the directors of a company paid into the bank the amount remaining uncalled on their shares, and on the same day appropriated the money in payment of their fees, for which there were at the time, as they knew, no available assets; it was held that the effect of the transaction was that there had been no *bonâ fide* payment in anticipation of calls, and that the directors, who were bound to exercise the powers given to them for the benefit of the company generally, and not with a view to their own private interest, were not relieved from liability upon their shares (*z*).

The Court has summary jurisdiction under ss. 101, 165 of the Companies Act, 1862, to order a contributory or director to repay a dividend declared and paid under a delusive or fraudulent balance sheet. But the balance sheet of a company engaged in a hazardous trade will not be considered delusive and fraudulent merely because an estimated value was put upon assets of the company, which were then in jeopardy, and were

(*x*) *King's Case*, 6 Ch. 196; *Re Spackman v. Evans*, 3 E. & I. App. 171.
Humber Iron Works, &c., Co., 45 L. J. Ch. 48.

(*z*) *Syke's Case*, 13 Eq. 255.

(*y*) *Stanhope's Case*, 1 Ch. 169;

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subsequently lost, or because the company was obliged to borrow money, to pay the dividend, provided the facts fairly appeared on the balance sheet, and the balance fairly represented profits (*a*). The Court has summary power in a voluntary winding-up on the application of the liquidator to make an order under ss. 138 and 165 of the Companies Act, 1862, calling on a director to repay a dividend of *bonus* declared and paid to him under a delusive balance sheet (*b*).

Where shares in a joint stock company have been issued fraudulently, a *bonâ fide* purchaser of these shares in the market before any bill has been filed to impeach the transaction is entitled, on the winding-up of the company, notwithstanding the fraud, and notwithstanding that he bought the shares at a very great discount, to prove on equal terms with the other shareholders of the company who bought their shares at par; but this privilege does not extend to any person who purchased his shares after the filing of the bill, unless his vendor was a *bonâ fide* holder of the shares before bill filed, and the *onus* of proof that such was the case is upon him (*c*).

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SECTION IX.—FRAUD UPON THE MORTMAIN LAWS.

The Court will relieve against a fraud on the Mortmain laws. The statute 9 Geo. II. c. 36, cannot be evaded by a secret trust, and the heir may compel the devisee to disclose any promise which he may have made to the testator to devote the land to charity (*d*); and such promise, if denied by the devisee, may be proved by evidence *aliunde* (*e*). The trust, by whatever means established, invalidates the devise. This doctrine evidently assumes that the trust, if legal, would have been binding on the conscience of, and might have been enforced against, the devisee; and this ground failing, the rule does not apply: as where a testator, after devising lands by a will duly attested,

(*a*) *Stringer's Case*, 4 Ch. 475.

(*b*) *Rance's Case*, 6 Ch. 104.

(*c*) *Barnard v. Bagshaw*, 1 H. & M.
69.

(*d*) *Boson v. Statham*, 1 Ed. 508;

Muckleston v. Brown, 6 Ves. 52;

Stickland v. Aldridge, 9 Ves. 516;

Paine v. Hull, 18 Ves. 475.

(*e*) *Edwards v. Pike*, 1 Ed. 267, 1

Cox, 17.

declares a trust in favour of a charity by an unattested paper or by parol, the Statute law, which affords to the devisee a valid defence against any claim on the part of the charity, of course equally defends him against the claim of the heir, founded on the charitable trust (*f*). The case would be different, however, if the devisee had prevailed on the testator to give him the estate absolutely under an assurance that the unattested paper was a sufficient declaration of trust for the charity (*g*), or under a promise that if the estate were devised to him he would perform the trust (*h*).

SECTION X.—FRAUDS ON THE LAW OF FORFEITURE.

A Court of Equity will relieve against frauds on the law of forfeiture.

The Crown coming in on the foot of an attainder has all the rights of the party forfeiting, and has the same equity to be relieved against conveyances on the ground of fraud as he would have. The Crown, on a forfeiture, takes the estate subject to all charges and incumbrances which would have bound the party forfeiting, and is bound, too, thereby, where there is no fraud, in respect of the Crown. If, however, the attainted party has voluntarily and designedly made a grant or conveyance to encumber his estate, with a view to high treason, the Crown, and those taking from it, would have a right to dispute that demand and be delivered therefrom as fraudulent (*i*).

If a man gives an estate to A. and his heirs, but in case he commits high treason, over to another, this is a void limitation, because it is an evasion of the laws of forfeiture (*k*). So also a man may substitute another legatee or executor, if the first

(*f*) *Adlington v. Cann*, 3 Atk. 141, cit. 9 Ves. 519; *Wallygrave v. Tebbs*, 2 K. & J. 313; *Lomax v. Ripley*, 3 Sm. & G. 48; *Jones v. Badley*, 3 Ch. 364.

(*g*) See *Adlington v. Cann*, 3 Atk. 152.

(*h*) *Russell v. Jackson*, 10 Ha. 204; *Jones v. Badley*, 3 Ch. 364. See Jarman on Wills, vol. i., pp. 233, 234.

(*i*) *Duke of Bedford v. Coke*, 2 Ves. 115.

(*k*) *Carte v. Carte*, 3 Atk. 180; Amb. 32.

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should die during the life of the testator, but he cannot extend it beyond the term of his own life (*l*).

SECTION XI.—FRAUD ON THE STOCK EXCHANGE.

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Another case of fraud is where parties conspire together in procuring a settling day and a quotation on the Stock Exchange for the purpose of inducing those who deal on the Stock Exchange and see the quotation to believe that a company has been proved to the satisfaction of the Stock Exchange to be a real company, started to this extent, that the rules of the Stock Exchange have been complied with, so that in consequence of that belief they should think the company was a better company than it really was, the company being in fact one which was not genuine, in which the calls had not been paid, the shares never allotted, and altogether such a company that if the truth had been known it never would have been allowed to get on the Stock Exchange (*m*).

SECTION XII.—FRAUD ON THE MARRIAGE ACT.

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It is enacted by 4 Geo. IV. c. 76, s. 23, that if any valid marriage solemnized by licence shall be procured by a party to the marriage to be solemnized between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, by means of such party falsely swearing as to any matter to which such party is required by the Act personally to swear, such party wilfully and knowingly so swearing, or if any valid marriage by banns shall be procured by a party thereto to be solemnized by banns between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, such party knowing that such person under the age of twenty-one years had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns

(*l*) *Ib*.

(*m*) *Queen v. Aspinall*, 2 Q. B. D. 48.

had not been duly published, and having knowingly caused or procured the undue publication of banns, in every such case it shall be lawful for the Attorney-General by information at the relation of a parent or guardian of the minor whose consent has not been given to such marriage, and who shall be responsible for any costs incurred in such suit, such parent or guardian previously making oath as is by the Act required, to sue for a forfeiture of all estate, right, title, and interest in any property which hath accrued or shall accrue to the party so offending by force of such marriage; and the Court shall have power to declare such forfeiture, and thereupon to order and direct that all such estate, right, title, and interest, in any property as shall then have accrued or shall thereafter accrue to such offending party by force of such marriage shall be secured under the direction of the Court for the benefit of the innocent party or of the issue of the marriage, or of any of them, in such manner as the Court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal estate, or pecuniary benefits from such marriage.

Sect. 24 avoids all settlements, agreements, &c., made upon such marriages.

By the Marriage and Registration Amendment Act, 1856 (19 & 20 Vict. c. 119), s. 19, the same penalties are extended to the case of a marriage before a registrar under 6 & 7 Will. 4, c. 85 had by means of any wilfully false declaration, notice, or certificate. And by 12 & 13 Vict. c. 68, s. 15, the same penalties attach when a marriage is celebrated abroad under the provisions of the Act by means of any wilfully false notice, oath, affirmation, or declaration made by either party to such marriage (*n*).

When a forfeiture has been incurred under s. 23 the Court has no discretion to mitigate the penalty, but is bound to settle and secure all property present and future of the wife for the benefit of herself or the issue of the marriage (*o*), so as to

(*n*) See as to the extension of these provisions to marriages according to the usages of Quakers and Jews, 19 & 20 Vict. c. 119, s. 21; 23 Vict. c.

18, s. 2.

(*o*) *Att.-Gen. v. Mulla*, 4 Russ. 329.

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prevent the offending husband from deriving any interest or pecuniary benefit from the marriage *jure mariti* (*p*). The Act applies to the case of a woman marrying an infant by means of a false affidavit that he is of full age (*q*).

In *Attorney-General v. Read* (*r*), Bacon, V.-C., following with great reluctance the order made in *Attorney-General v. Lucas*, did not exclude the offending husband from the general power of appointment to the wife in default of children (*s*).

The Attorney-General must appear separately from the relator in such cases (*t*).

To sustain the information, it is not necessary to show that the infant with whom the marriage was procured, was entitled at the time thereof to any property either in possession, reversion, remainder or expectancy (*u*). The offending husband will not be allowed his costs out of the fund (*x*).

SECTION XIII.—FRAUD UPON RESTRAINING STATUTES, ETC.

Sect. 13.

In addition to those already enumerated, there are other frauds upon Statutes or Acts of Parliament, against which relief may be had in equity: such as, fraud upon the Restraining Statutes (*y*); fraud upon the Registry Acts (*z*); fraud upon a private Act of Parliament (*a*); fraud on the Revenue laws (*b*); and fraud upon the Patent law (*c*).

(*p*) *Att.-Gen. v. Lucas*, 2 Ph. 753.

(*q*) *Att.-Gen. v. Severne*, 1 Coll. 313.

(*r*) 12 Eq. 38.

(*s*) See *Att.-Gen. v. Clements*, ib.
32. See as to form of order, *Att.-Gen. v. Akers*, Set. on Dec. 768.

(*t*) *Att.-Gen. v. Read*, 12 Eq. 41.

(*u*) *Att.-Gen. v. Severne*, 1 Coll. 313.

(*x*) *Att.-Gen. v. Akers* (W. N. 1872) 45; *Att.-Gen. v. Clements*, 12 Eq.

36.

(*y*) *Dean and Chapter of Windsor v. Penwin*, Moor. 789.

(*z*) *Curtis v. Perry*, 6 Ves. 739; *Osborne v. Williams*, 18 Ves. 379; *Battersby v. Smyth*, 3 Madd. 110.

(*a*) *Howard v. Earl of Shrewsbury*, 2 Ch. 772.

(*b*) *Evans v. Richardson*, 3 Mer. 469.

(*c*) *Re Bailey's Patent*, 8 Ch. 60; *Ex parte Scott v. Young*, 6 Ch. 275.

SECTION XIV.—FRAUD IN AWARDS.

Courts of equity have from a very early period had jurisdiction to set aside awards on the ground of fraud (*d*), and still entertain the jurisdiction, except where it is excluded by statute (*e*).

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In cases where the submission to arbitration was by agreement between the parties, the only mode of obtaining relief formerly against an award which had been obtained under circumstances of fraud and corruption on the part of the arbitrator, was by bill in equity. But if the agreement or submission to arbitration be in writing, and contain a proviso that it may be made a rule of Court, the case is now governed by stat. 9 & 10 Will. 3, c. 15, and the jurisdiction of equity is excluded (*f*). A court of equity has no jurisdiction, even on the ground of fraud, if a submission has been made a rule of a court of common law under the statute (*g*).

If there be a proviso in the agreement or submission to arbitration enabling the parties to make it a rule of Court, it is immaterial that it may not have been actually made a rule of Court until after the award has been made, or until after bill filed (*h*). The Court of Chancery is one of the Courts of record invested with summary jurisdiction under the statute (*i*). If there was no proviso in the agreement or submission to arbitration enabling the parties to make it a rule of Court, the jurisdiction was, until a recent period, exclusive in equity (*k*). But by the seventeenth clause of the Common Law Procedure Act, 17 & 18 Vict. c. 125, it is declared that every agreement or submission to arbitration by consent, whether by deed or instrument in writing, may be made a rule of a court of com-

- (*d*) *Greenhill v. Church*, 3 Rep. 576, 2 D. J. & S. 297.
 Ch. 49; *Brown v. Brown*, 1 Vern. 121;
 156; *Earl v. Stocker*, 1 Vern. 251; *Dawson v. Sudler*, 1 Sim. & St. 537.
Burton v. Knight, ib. 514. (*g*) *Nichols v. Roe*, 3 M. & K. 439;
 (*e*) *Smith v. Whitmore*, 1 H. & M. 576, 2 D. J. & S. 297. (*h*) *Heming v. Swinerton*, 2 Ph. 79.
 (*f*) *Heming v. Swinerton*, 2 Ph. 79.
 79; *Smith v. Whitmore*, 1 H. & M. 576, 2 D. J. & S. 297. (*i*) *Heming v. Swinerton*, 2 Ph. 79.
 (*k*) — v. *Mills*, 17 Ves. 419;
Goodman v. Sayers, 2 J. & W. 249.

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mon law, unless a contrary intention appears. The mere existence, however, of a power to make an agreement or submission to arbitration a rule of Court is not tantamount to an agreement that it shall be made so, nor does it of itself, and independently of agreement, exclude the ordinary jurisdiction of the Court (*l*). If there be no proviso that it may be made a rule of Court, it does not become a rule of Court under the Common Law Procedure Act, unless it be actually made a rule of Court (*m*).

Before the statute 9 & 10 Will. 3, c. 15, courts of law were in the practice, upon consent of parties, of referring causes to arbitration, either by rule of Court or by order of a judge, or at *nisi prius*, and of making the submission at the same time a rule of Court. In such cases courts of equity exercised a concurrent jurisdiction over the award made upon the reference with courts of law, and the statute of William does not appear to have interfered with the jurisdiction (*n*). Nor has the jurisdiction been excluded by the enlarged powers conferred on courts of common law by the Common Law Procedure Act, 17 & 18 Vict. c. 125 (*o*). It is, however, the rule of the Court not to interfere with an award made under a reference at law, unless there be something in the circumstances of the case to show or to make it appear that a court of law has not full power and jurisdiction to grant full and adequate relief. The fact that a court of common law has a power of remitting the award for reconsideration, has weight with a court of chancery when called upon to interfere (*p*).

There is fraud in an award, if it be obtained through corruption or partiality on the part of the arbitrator (*q*). In a case where arbitrators had, either by force or fraud, excluded a co-

(*l*) *Smith v. Whitmore*, 2 D. J. & S. 308, *per* Turner, L. J.

(*m*) *Ib*.

(*n*) *Lord Lonsdale v. Littledale*, 2 Ves. Jr. 451; *Nicols v. Chalie*, 14 Ves. 267; *Nicolls v. Roe*, 3 M. & K. 439; *Chuck v. Cremer*, 2 Ph. 477; *Harding v. Wickham*, 2 J. & H. 676.

(*o*) Ss. 3—16.

(*p*) *Londonderry and Enniskillen Railway Co. v. Leisham*, 12 Beav. 423; *Harding v. Wickham*, 2 J. & H. 676.

(*q*) *Lord Lonsdale v. Littledale*, 2 Ves. Jr. 453; *Lingood v. Croucher*, 2 Atk. 396; *Moseley v. Simpson*, 16 Eq. 226.

arbitrator, or either of the parties, from their meetings, it was held to furnish such a presumption of corruption as to be a sufficient ground for setting aside the award (*r*). So, also, it is against good faith for a person appointed arbitrator to consider himself as agent of the person appointing him (*s*), or to buy up the unsustained claims of any of the parties to the reference (*t*). So, also, there is fraud, if the award has been obtained by fraud or concealment of material circumstances on the part of one of the parties, so as to mislead the arbitrator. If either party be guilty of fraudulent concealment of matters which he ought to have declared, or if he wilfully mislead or deceive the arbitrator, the award may be set aside (*u*). An award will not, however, be set aside on the ground that the arbitrator has been misled by the evidence of a witness who might have been cross-examined (*x*). There is also fraud to set aside an award, if the award be obtained by undue means, as, for instance, if the witnesses have been examined in the absence of the parties (*y*); or if the award has been made clandestinely without hearing each party (*z*); or if the award has been made by one arbitrator apart from the others (*a*); or if the interviews have taken place between the arbitrator and one party in the absence of the others (*b*). So, also, the existence of any ground calculated to bias the mind of the arbitrator, unknown to either of the parties, is sufficient for the interference of the Court (*c*); or if one of the parties has not been allowed a proper opportunity of discussing his case (*d*). If interviews have taken place between the arbitrator and one of the parties in the absence of the other,

(*r*) *Burton v. Knight*, 2 Vern. 514.
See *Haigh v. Haigh*, 3 D. F. & J.
159.

(*s*) *Calcraft v. Roebuck*, 1 Ves. Jr.
226.

(*t*) *Blennerhasset v. Day*, 2 Ba. &
Be. 116.

(*u*) *South Sea Co. v. Bumpstead*,
Vin. Ab. Arbitr. (1 a.) 39, 2 Eq. Ca.
Ab. 89; *Ives v. Medcalfe*, 1 Atk. 64;
Gartside v. Gartside, 3 Anst. 735.

(*x*) *Pilmore v. Hood*, 8 Scott, 180.

(*y*) *Re Plews and Middleton*, 6 Q. B.

845. See *Haigh v. Haigh*, 3 D. F.
& J. 159.

(*z*) *Ives v. Medcalfe*, 1 Atk. 64;
Harding v. Wickham, 2 J. & H. 676.
See *Smith v. Whitmore*, 1 H. & M.
576.

(*a*) *Re Plews and Middleton*, 6 Q. B.
582.

(*b*) *Harvey v. Shelton*, 7 Beav. 455.

(*c*) *Kemp v. Rose*, 1 Giff. 258.

(*d*) *Spettigue v. Carpenter*, 3 P.
Wms. 361.

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similar misconduct on the part of the person applying will not prevent the Court from setting aside the award, for the matter concerns the due administration of justice (*e*).

Equity will not give relief against an award, if the conduct of the party making the application has been such as to destroy his right to resort to the Court for relief (*f*). An agreement for reference, accordingly, cannot be set aside as obtained by undue pressure, if the party objecting has attended the reference and taken the chance of an award in his favour (*g*). Nor can relief be had against an award when there has been any laches on the part of the person making the application (*h*). Similar misconduct, however, to that complained of on the part of the person making the application, will not prevent the Court from setting aside an award, if the award has been obtained by undue means (*i*).

In cases where fraud is charged, the Court will in general refuse to send the dispute to arbitration, if the party charged with fraud desires a public enquiry. But where the objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, and will never do so, unless a *prima facie* case of fraud is proved (*k*).

SECTION XV.—FRAUD IN JUDGMENTS.

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A judgment or decree obtained by fraud upon a Court, binds not such Court or any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding (*l*). “Fraud,” said De Grey, C.J., “is an extrinsic, collateral act, which vitiates the most solemn proceed-

(*e*) *Harvey v. Shelton*, 7 Beav. 455.

(*f*) *Smith v. Whitmore*, 1 H. & M. 576, 2 D. J. & S. 297.

(*g*) *Ormes v. Beadel*, 2 Giff. 166, 2 D. F. & J. 333; *Ex parte Wylld*, 2 D. F. & J. 642.

(*h*) *Jones v. Bennett*, 1 Bro. P. C. 528. See *Eads v. Williams*, 4 D. M. & G. 674; *Nichols v. Hancock*, 7 D. M. & G. 300.

(*i*) *Harvey v. Shelton*, 7 Beav. 455.

(*k*) *Russell v. Russell*, 14 Ch. D. 471.

(*l*) *Philippson v. Lord Egremont*, 6 Q. B. 582; *Lord Bauldon v. Becher*, 3 Cl. & Fin. 510; *Shedden v. Patrick*, 1 Macq. 535; *Reg. v. Saddlers' Co.*, 10 H. L. 431, *per* Willes, J. See *Tommey v. White*, 4 H. L. 313.

ings of Courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical and temporal" (*m*). In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud (*n*). Whether an innocent party would be allowed to prove in one court that a judgment against him in another court was obtained by fraud, is a question not equally clear, as it would be in his power to apply directly to the court which pronounced it to vacate it (*o*). But however this point may be ultimately determined, thus much is evident, that a guilty party would not be permitted to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court, for it would be an outrage on justice and common sense, if a person could thus avoid the consequences of his own fraudulent conduct (*p*).

A foreign judgment can be impeached, if it be made to appear that it was fraudulently obtained. When a question between the parties has been decided by a foreign Court, with jurisdiction, that decision is, as a general rule, conclusive, and cannot be opened on the merits; but if the foreign judgment was obtained by fraud, that would be an answer to any proceeding founded on the judgment (*q*).

A judgment by consent is binding, but if it appear that the consent was obtained by fraud, the Court will treat the con-

(*m*) *Rex v. Duchess of Kingston*, 20 How. St. Tr. 544, 2 Smith, L. C. 687; *Shand v. Du Buisson*, 18 Eq. 283. See *Meddowcroft v. Huguenin*, 4 Moo. P. C. 386; *Perry v. Meddowcroft*, 10 Beav. 122; *Harrison v. Mayor, &c., of Southampton*, 4 D. M. & G. 137; *Cunnam v. Reynolds*, 5 E. & B. 306.

(*n*) *Shedden v. Patrick*, 1 Macq. 535.

(*o*) *Prudham v. Philipps*, 2 Ambl.

763, 20 How. St. Tr. 479, 481; *Ree v. Duchess of Kingston*, 20 How. St. Tr. 544.

(*p*) *Prudham v. Philipps*, 2 Ambl. 763, 20 How. St. Tr. 479; *Doe v. Roberts*, 2 B. & Ald. 367; *Bessey v. Windham*, 6 Q. B. 166.

(*q*) *Bank of Australasia v. Nias*, 16 Q. B. 717; *Ochsenbein v. Papelier*, 8 Ch. 700; *Messina v. Petrochino*, L. R. 4 P. C. 144; *Aboulloff v. Oppenheim*, 52 L. J. Q. B. 1.

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sent as a nullity (*r*). So, also, if it be made to appear that a judge's order has been obtained by fraud or by the suppression of information which it was essential the Court should know, the order will be set aside (*s*).

SECTION XVI.—FRAUD UPON THE CROWN.

Sect. 16.

A conveyance executed in fraud of proceedings under an outlawry, is a fraud upon the Crown, and will be set aside (*t*).

Sect. 17.

SECTION XVII.—FRAUD UPON COURTS OF COMPETENT JURISDICTION.

The Court of Chancery would give assistance to enforce the judgments, decrees, or sentences of other courts of competent and lawful civil jurisdiction, when the execution of such judgments, decrees, and sentences was defeated or obstructed by fraudulent contrivances (*u*).

A voluntary settlement, accordingly, of real and personal estate, made by a man who was defendant in a suit in the Ecclesiastical Court, with the intent of withdrawing his property from the process of that Court, was set aside (*x*). Although the deed might have been executed before any right was declared, or any order for payment of money was made, yet if it appeared that the deed was executed for the purpose of defeating the right which the defendant knew the plaintiff was entitled to establish, it was considered to have been executed with the view and intention of defrauding him (*y*).

SECTION XVIII.—FRAUD UPON THE LEGISLATURE.

Sect. 18.

In *Vauxhall Bridge Co. v. Earl Spencer* (*z*), it was held

(*r*) *Stannard v. Harrison*, 19 W. R. 812.

(*s*) *Ex parte Cockerell*, 4 C. P. D. 39, per Lord Coleridge.

(*t*) *Att.-Gen. v. Rickards*, 1 Ph. 383, 12 Cl. & Fin. 43.

(*u*) *Blenkinsopp v. Blenkinsopp*, 12 Beav. 586.

(*x*) *Ib.*; 1 D. M. & G. 500.

(*y*) *Ib.*

(*z*) 2 Madd. 366, S. C. Jac. 64.

that an agreement between a landowner and a company, that, in the event of his not opposing an application to Parliament, the landowner should receive a sum of money, is a fraud upon the legislature if concealed from Parliament, and is therefore void upon grounds of public policy. But the principle upon which that case was founded is open to much question. The better opinion would seem to be, that there is no fraud upon the legislature unless the agreement is one which the parties are bound to communicate. There may be cases in which an agreement of the sort should be communicated to the legislature, but there can be no doubt that in ordinary cases it is open to parties to enter into such an agreement, and that there is no obligation incumbent on them to communicate it to the legislature (*a*). The question whether such an agreement is binding on the Company after incorporation, is a very different one.

(*a*) *Simpson v. Lord Howden*, 10 obtaining a local Act of Parliament,
A. & E. 793, 9 Cl. & Fin. 61 ; *Taylor*
v. Chichester, &c., Railway Co., L. R. *Mangles v. Grand Dock Colliery Co.*,
10 Sim. 519.
2 Exch. 356. See as to fraud in

CHAPTER VI.

HOW THE RIGHT TO IMPEACH A TRANSACTION ON THE GROUND OF FRAUD MAY BE LOST.

Chap. VI.

TRANSACTIONS, although impeachable in equity at the time of inception, and for some time afterwards, on the ground of fraud, may become unimpeachable by a subsequent confirmation, by acquiescence, or by the mere lapse of time.

SECTION I.—CONFIRMATION.

Sect. 1.

In order that an act may have any effect or validity as a confirmation, it must clearly appear that the party confirming was fully apprised of his right to impeach the transaction, and acted freely, deliberately, and advisedly, with the intention of confirming a transaction which he knew, or might, or ought with reasonable or proper diligence to have known, to be impeachable. If his right to impeach the transaction be concealed from him, or a free disclosure be not made to him of every circumstance which it is material for him to know, or if the act takes place under pressure or constraint, or by the exercise of undue influence, or under the delusive opinion that the original transaction is binding on him, or if it be merely a continuation of the original transaction, the confirmation operates as nothing (*a*).

(*a*) *Cann v. Cann*, 1 P. Wms. 727 ; *Cholmondeley*, 1 R. & M. 425 ;
Croze v. Ballard, 3 Bro. C. C. 119, 2 *Wedderburn v. Wedderburn*, 2 Keen,
Cox, 253 ; *Walker v. Symonds*, 3 Sw. 722 ; *De Montmorency v. Devereux*, 7
1 ; *Murray v. Palmer*, 2 Sch. & Lef. Cl. & Fin. 188 ; *Mulhullen v. Marum*,
486 ; *Morse v. Royal*, 12 Ves. 355 ; 3 Dr. & War. 317 ; *Salmon v. Cutts*,
Purcell v. Macnamara, 14 Ves. 91 ; 4 Deg. & S. 132 ; *Stump v. Gaby*, 2
Gowland v. De Faria, 17 Ves. 20 ; D. M. & G. 623 ; *Roberts v. Tunstall*,
Wood v. Downes, 18 Ves. 128 ; *Say* 4 Ha. 257 ; *Waters v. Thorn*, 22 Beav.
v. Barwick, 1 V. & B. 195 ; *Cockerell* 547 ; *Savery v. King*, 5 H. L. 627 ;

To make a confirmation of any value, the parties must be at arm's length, on equal terms, with equal knowledge, and with sufficient advice for protection. There must be full knowledge of all the facts, full knowledge of the equitable rights arising out of these facts, and an absolute release from the undue influence by which the fraud was practised (*b*). Confirmation may be by will as well as by deed (*c*). A confirmation by will of a previous gift to a person filling a fiduciary character will confirm the gift, although the fiduciary relation was still subsisting at the death of the testator (*d*), unless the will was part of the same scheme of fraud (*e*). If an independent legal adviser be employed, it will be assumed that he had satisfied himself, before approving of the transaction, that it was for the benefit of his client to confirm it (*f*). But an agreement by way of confirmation though prepared by an independent solicitor may be set aside, if that one of the parties for whom the solicitor is acting is under the influence of the other party (*g*). There can be no confirmation where there is such a gross fraud as that a deed is void on the face of it at law (*h*); nor can an agreement rendered inoperative by a collateral fraudulent agreement be made valid by an abandonment of the collateral agreement (*i*). A confirmation of part of a deed confirms the whole (*j*).

SECTION II.—RELEASE.

The same requisites which are necessary to render a confirmation valid, are necessary to render a release valid (*k*).

- Athenæum Life Society v. Pooley*, 3 D. & J. 299; *Smith v. Kay*, 7 H. L. 750; *Wall v. Cockrell*, 10 H. L. 229; *Potts v. Surr*, 34 Beav. 543; *Kempson v. Ashbee*, 10 Ch. 15.
- (*h*) *Moxon v. Payne*, 8 Ch. 881.
- (*c*) *Stump v. Gaby*, 2 D. M. & G. 623. See *Waters v. Thom*, 22 Beav. 547.
- (*d*) *Stump v. Gaby*, 2 D. M. & G. 623.
- (*e*) *Lyon v. Howe*, 6 Eq. 658.
- (*f*) *Staines v. Parker*, 9 Beav. 388; *De Montmorency v. Devereux*, 7 Cl. & Fin. 188; *Aspland v. Watte*, 20 Beav. 474.
- (*g*) *Moxon v. Payne*, 8 Ch. 881.
- (*h*) *Stump v. Gaby*, 2 D. M. & G. 630.
- (*i*) *Moxon v. Payne*, 8 Ch. 881.
- (*j*) *Milner v. Harewood*, 18 Ves. 277; *Jarrett v. Aldham*, 9 Eq. 463.
- (*k*) *Lloyd v. Atwood*, 3 D. & J. 614; *Spuckman's Case*, 34 L. J. Ch.

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The general words in a release are limited always to that thing or those things which were especially in the contemplation of the parties at the time when the release was made. But a dispute that had not emerged on a question which had not at all arisen cannot be considered as bound or concluded by the anticipatory words of a general release (*l*).

SECTION III.—ACQUIESCENCE.

Sect. 3.

It is not necessary, in order to render a transaction unimpeachable, that any positive act of confirmation or release should take place. It is enough, if proof can be given of a fixed and unbiassed determination not to impeach the transaction. This may be proved, either by acts evidencing acquiescence, or by the mere lapse of time during which the transaction has been allowed to stand (*m*).

Acquiescence or delay for a length of time after a man is in a situation to enforce a right, and with a full knowledge of facts, is, in equity, cogent evidence of a waiver and abandonment of the right (*n*). If a voidable contract, or other transaction, is voluntarily acted on, with a knowledge of all the facts, in the hope that it may turn out to the advantage of a party who might have avoided it, he may not void it when, after abiding that event, it has turned out to his disadvantage (*o*).

To fix acquiescence upon a party it must unequivocally appear that he knew or had notice of the fact upon which the

329 ; *Farrant v. Blanchford*, 1 D. J. & S. 119 ; *Aveline v. Melhuish*, 2 D. J. & S. 289. See *Heron v. Heron*, 2 Atk. 160 ; *Pusey v. Desbouverie*, 3 P. Wms. 315 ; *Steadman v. Palling*, 3 Atk. 423 ; *Bowles v. Stuart*, 1 Sch. & Lef. 209 ; *Wedderburn v. Wedderburn*, 2 Keen, 728, 4 M. & C. 41 ; *Duke of Leeds v. Amherst*, 2 Ph. 117 ; *Eyre v. Burnester*, 10 H. L. 106 ; *Skilbeck v. Hilton*, 2 Eq. 587.

(*l*) *London & South-Western Railway Co. v. Blackmore*, 4 E. & I. App.

623, per Lord Westbury ; *Turner v. Turner*, 14 Ch. D. 829.

(*m*) *Wright v. Vanderplank*, 8 D. M. & G. 133 ; *Jarrett v. Aldam*, 9 Eq. 466 ; *Turner v. Collins*, 7 Ch. 329 ; *Mitchell v. Homfray*, 8 Q. B. D. 587.

(*n*) *Duke of Leeds v. Lord Amherst*, 2 Ph. 117, 123 ; *Life Association of Scotland v. Siddall*, 3 D. F. & J. 73 ; *Skottowe v. Williams*, ib. 535.

(*o*) *Ormes v. Beadel*, 2 D. F. & J. 336, per Lord Campbell.

alleged acquiescence is founded, and to which it refers (*p*). Acquiescence imports and is founded on knowledge. A recognition resulting from ignorance of a material fact goes for nothing. The question as to acquiescence cannot arise unless the party against whom it is set up was aware of his rights. A man cannot be said to acquiesce in what he does not know, nor can he be bound by acquiescence unless he is fully apprised as to his rights and all the material facts and circumstances of the case (*q*). Acquiescence in what has been done will not be a bar to relief when the party alleged to have acquiesced has acted or abstained from acting through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed (*r*).

Nor, indeed, is a recognition of avail which assumes the validity of a transaction, if the question as to its validity does not appear to have come before the parties (*s*). The mere fact that a man may have heard unfavourable rumours, and conceived suspicions, is not enough to fix him with acquiescence (*t*). The proof of knowledge lies on the party who alleges acquiescence, and sets it up as a defence (*u*). If the transaction has taken place under pressure, or the exercise of undue influence, it must

(*p*) *Randall v. Errington*, 10 Ves. 428; *Spackman's Case*, 34 L. J. Ch. 321, 326; *Stanhope's Case*, 1 Ch. 161; *Stewart's Case*, ib. 514.

(*q*) *Randall v. Errington*, 10 Ves. 426; *Blennerhassett v. Day*, 2 B. & B. 104; *Cholmondeley v. Clinton*, 2 Mer. 361; *Honner v. Morton*, 3 Russ. 65; *Cockerell v. Cholmeley*, Tambl. 435; *Austin v. Chambers*, 6 Cl. & Fin. 1; *Charter v. Trevelyan*, 11 Cl. & Fin. 714; *Cockell v. Taylor*, 15 Beav. 122; *Burrows v. Walls*, 5 D. M. & G. 233; *Lloyd v. Attwood*, 3 D. & J. 624; *Savery v. King*, 5 H. L. 627; *Bright v. Legerton*, 2 D. F. & J. 617; *Life Association of Scotland v. Siddall*, 3 D. F. & J. 74; *Bullock v. Downes*, 9 H. L. 1; *Wall v. Cockerell*, 10 H. L. 229; *Berdor v. Dawson*, 34 Beav. 603; *Vyryan v.*

Vyryan, 30 Beav. 65; *Spackman's Case*, 34 L. J. Ch. 329; *Stewart's Case*, 1 Ch. 514; *Bagnall v. Carlton*, 6 Ch. D. 371; *De Bussche v. Alt*, 8 Ch. D. 287, *supra*, pp. 102, 103.

(*r*) *Earl Beauchamp v. Winn*, 6 E. & I. App. Ca. 223.

(*s*) *Honner v. Morton*, 3 Russ. 65; *Wright v. Vanderplank*, 8 D. M. & G. 133. See *Baker v. Bradley*, 7 D. M. & G. 597.

(*t*) *Central Railway Co. of Venezuela v. Kisch*, E. & I. 2 App. Ca. 112.

(*u*) *Bennett v. Colley*, 2 M. & K. 225; *Burrows v. Walls*, 5 D. M. & G. 233; *Life Association of Scotland v. Siddall*, 3 D. F. & J. 58; *Wall v. Cockerell*, 10 H. L. 229; *Spackman's Case*, 34 L. J. Ch. 329.

clearly and unequivocally appear that the party against whom acquiescence is alleged was *sui juris*, and was released from the influence or the pressure under which he stood at the time of the transaction, and acted freely and advisedly in abstaining from impeaching it. Acquiescence goes for nothing so long as a man continues in the same situation in which he was at the date of the transaction (*x*). But as soon as a man with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly and deliberately permits another to deal with the property, or incur expense, under the belief that the transaction has been recognised, or freely and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity (*y*). If, for instance, a man after discovering that the representations in a prospectus, on the faith of which he has purchased shares, are false, deals with the shares as owner, by instructing a broker to sell them (*z*), or receives a dividend and pays a call (*a*), or attends meetings and continues to act as a shareholder (*b*), or concurs in the appointment of a

(*x*) *Gowland v. De Faria*, 17 Ves. 25; *Gregory v. Gregory*, Coop. 201; *Roche v. O'Brien*, 1 B. & B. 338; *Aylward v. Kearney*, 2 B. & B. 463; *Palmer v. Wheeler*, ib. 31; *Honner v. Morton*, 3 Russ. 65; *Duke of Leeds v. Lord Amherst*, 2 Ph. 117; *Addis v. Campbell*, 4 Beav. 401; *Roberts v. Tunstall*, 7 Ha. 257; *Salmon v. Cutts*, 4 Deg. & Sm. 132; *Wright v. Vanderplank*, 8 D. M. & G. 133; *Eyre v. McDonnell*, 15 Ir. Ch. 534; *Berloe v. Dawson*, 34 Beav. 603.

(*y*) *Selsey v. Rhodes*, 1 Bligh. N. S. 1; *Bellew v. Russell*, 1 Ba. & Be. 96; *Blennerhassett v. Day*, 2 Ba. & Be. 118; *Pigers v. Pike*, 8 Cl. & Fin. 652; *Charter v. Trevelyan*, 11 Cl. &

Fin. 714; *Champion v. Rigby*, Taunt. 421, 9 L. J. Ch. N. S. 211; *Maden v. Veivers*, 5 Beav. 511; *Nagle v. Baylor*, 3 Dr. & War. 60; *Edwards v. Meyrick*, 2 Ha. 75; *Loader v. Clark*, 2 Mac. & G. 387; *Stone v. Godfrey*, 5 D. M. & G. 76; *Lyddon v. Moss*, 4 D. & J. 104; *Dimsdale v. Dimsdale*, 3 Drew. 556; *Farrant v. Blanchford*, 1 D. J. & S. 107; *Caincross v. Lorimer*, 3 Macq. 830; *Archbold v. Scully*, 9 H. L. 360; *Turner v. Collins*, 7 Ch. 329.

(*z*) *Ex parte Briggs*, 1 Eq. 483.

(*a*) *Scholey v. Central Railway of Venezuela*, 9 Eq. 266 n.

(*b*) *Sharpley v. Louth & East Coast Railway Co.*, 2 Ch. D. 685.

committee of investigation into the affairs of the company on behalf of the shareholders (*c*), or does anything which amounts to an affirmation of the contract (*d*), there is acquiescence. So where a party, with full knowledge of the misrepresentation alleged to have been made, by his conduct agrees to treat the transaction as binding, he is precluded in equity from insisting on the misrepresentation in a suit for specific performance (*e*). And where plaintiffs sought to avoid an agreement for the lease of a mine, on the ground of fraudulent misrepresentation of its value, it was held that having continued to work the mine after full knowledge of all the circumstances of the fraud, they were not entitled to relief (*f*).

The equitable rule as to acquiescence applies with peculiar force to the case of property which is of a speculative character, or is subject to contingencies, and can only be rendered productive by a large and uncertain outlay (*g*).

A distinction must be taken between cases where the acquiescence alleged takes place while the act is in progress, and cases where it does not take place until after the act has been completed. "The term 'acquiescence,'" said Thesiger, L. J., in *De Bussche v. Alt* (*h*), "is one which was said by Lord Cottenham in *Duke of Leeds v. Amhurst*, ought not to be used; in other words, it does not accurately express any known legal defence, but if used at all, it must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act is in progress, or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing on that right, stands by in such a manner as really

(*c*) *Lawrence's Case*, 2 Ch. 424.

(*d*) *Ogilvie v. Currie*, 37 L. J. Ch. 547.

(*e*) *Macbryde v. Weekes*, 22 Beav. 533.

(*f*) *Vigers v. Pike*, 8 Cl. & Fin. 562.

(*g*) *Norway v. Rowe*, 19 Ves. 144; *Small v. Attwood*, 6 Cl. & Fin. 232, 359; *Prendergast v. Turton*, 1 Y. &

C. C. C. 98, 13 L. J. Ch. 268; *Lovell v. Hicks*, 2 Y. & C. 46; *Jennings v. Broughton*, 5 D. M. & G. 140; *Clegg v. Edmondson*, 8 D. M. & G. 787; *Clements v. Hall*, 2 D. & J. 173; *Grosvenor v. Sherratt*, 28 Beav. 659; *Whalley v. Whalley*, 2 D. F. & J. 310.

(*h*) 8 Ch. D. 314.

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to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said, is the proper sense of the word 'acquiescence,' and in that sense may be defined as quiescence under such circumstances, as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right was then vested in him, which at all events cannot be divested without accord and satisfaction or release under seal. Mere submission to the injury for any period short of the period limited by statute for the enforcement of the right of action, cannot take away any such right, although, under the name of laches, it may afford ground for refusing relief under particular circumstances, and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding."

Where a wrongful act has been completed without the knowledge or assent of the party injured, his right of action is not ordinarily barred by mere submission to the injury, or even by a voluntary promise not to seek redress; some conduct amounting to release, or accord and satisfaction, must be shown, although on account of laches relief may be refused under certain circumstances (*i*).

The representatives of a man who has acquiesced in a particular transaction, cannot be in a better position than the man himself (*k*).

So, also, may a remainderman be bound by acquiescence (*l*). But there is no acquiescence, if the remainderman acts in a transaction merely as the attorney of the tenant for life (*m*).

(*i*) 8 Ch. D. 314.

(*l*) *Shannon v. Bradstreet*, 1 Sch. &

(*k*) *Walmesley v. Booth*, 2 Atk. Lef. 73.

25; *Bellew v. Russell*, 1 Ba. & Be.
96.

(*m*) *Liebman v. Harcourt*, 2 Mer.
520.

If a company have recognised a transfer of shares, by forfeiting the shares for non-payment of calls, they lose the right to set aside the transfer, or to deal with the transferee as a shareholder (*n*). If the company, before the winding-up, have recognised a transfer of shares, the Court will not, in the winding-up, set aside the transfer, and put the name of the transferor on the list of contributories (*o*).

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The doctrine of acquiescence applies even as between trustee and *cestui que trust*, even in cases of express trusts (*p*). A *cestui que trust*, whose interest is reversionary, though not bound to assert his title until he comes into possession, is not less capable of giving his assent to a breach of trust while the interest is in reversion than when it is in possession. Whether he has done so or not depends on the facts of each particular case (*q*).

SECTION IV.—DELAY AND LAPSE OF TIME.

The mere lapse of time during which a transaction has been allowed to stand may render it unimpeachable in equity. A man who seeks the aid of the Court must assert his claim with reasonable diligence (*r*). It is a rule of equity not to encourage stale demands, or give relief to parties who sleep on their rights. The rule is founded on the difficulty of procuring full evidence of the character and particulars of remote transactions, and is independent of the Statute of Limitations (*s*). In the case of

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(*n*) *Chymoweth's Case*, 15 Ch. D. 20.

(*o*) *Ib.*

(*p*) *Walker v. Symonds*, 3 Sw. 64, 75; *Burrows v. Walls*, 5 D. M. & G. 233; *Farrant v. Blanchford*, 1 D. J. & S. 107.

(*q*) *Life Association of Scotland v. Siddall*, 3 D. F. & J. 58, 73.

(*r*) *Smith v. Clay*, cit. 3 Bro. C. C. 639; *Jones v. Turberville*, 2 Ves. Jr. 11; *Hercy v. Dinwroody*, ib. 87; *Underwood v. Lord Courtown*, 2 Sch.

& Lef. 71; *Hickes v. Cooke*, 4 Dow. 16; *Chalmer v. Bradley*, 1 J. & W. 59; *Walford v. Adie*, 5 Ha. 112.

(*s*) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 630; *Beckford v. Wade*, 17 Ves. 87; *Chalmer v. Bradley*, 1 J. & W. 63; *Hickes v. Cooke*, 4 Dow. 16; *Raneliffe v. Parkins*, 6 Dow. 149, 232; *Whalley v. Whalley*, 3 Bligh, 17; *Cholmondeley v. Clinton*, 4 Bligh, 119; *Sibbering v. Earl of Balcarres*, 3 Deg. & S. 735; *Browne v. Cross*, 14 Beav. 105; *Hartwell v.*

legal titles and legal demands, Courts of Equity act in obedience to the Statutes of Limitations (*t*): but if the demand is not of a legal nature, or is strictly equitable, the Statutes of Limitations are not a bar in equity. Courts of Equity, however, look to them as guides (*u*), and assimilate their rules as far as they can, and as far as the transactions will admit, to the law (*x*). Where a bar exists by statute, equity will, in analogous cases, consider the equitable rights as bound by the same limitations (*y*): but in cases where the analogies of law do not apply, a Court of Equity is governed by its own inherent doctrine not to encourage stale demands. Parties who would have had the clearest title to relief, had they come in reasonable time, may deprive themselves of their equity by a delay which falls short of the period fixed by the statutes (*z*). Lapse of time, when it does not operate as a positive or statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver (*a*). The

Colvin, 16 Beav. 140; *Beaden v. King*, 9 Ha. 532; *Knight v. Bowyer*, 2 D. & J. 421, 443; *Gresley v. Mousley*, 4 D. & J. 78; *Harcourt v. White*, 28 Beav. 312; *Skottowe v. Williams*, 3 D. F. & J. 535.

(*t*) *Horenden v. Lord Annesley*, 2 Sch. & Lef. 631; *Foley v. Hill*, 1 Ph. 399; *Fulwood v. Fulwood*, 9 Ch. D. 178; *Gibbs v. Guild*, 9 Q. B. D. 59.

(*u*) *Hamilton v. Grant*, 3 Dow. 33; *Whalley v. Whalley*, 3 Bligh, 17; *Knox v. Gye*, 5 E. & I. App. Ca. 656.

(*x*) *Cholmondeley v. Clinton*, 4 Bligh, 1, 95; *Brooksbank v. Smith*, 2 Y. & C. 60; *Knox v. Gye*, 5 E. & I. App. Ca. 656; *Gibbs v. Guild*, 9 Q. B. D. 59.

(*y*) *Smith v. Clay*, cit. 3 Bro. C. C. 639; *Horenden v. Lord Annesley*, 2 Sch. & Lef. 607, 632; *Whalley v. Whalley*, 3 Bligh, 17; *Cholmondeley v. Clinton*, 4 Bligh, 1, 119; *Sibbering v. Earl of Balcarres*, 3 Deg. & S. 735; *Duke of Leeds v. Lord Amherst*,

2 Ph. 117; *Fulwood v. Fulwood*, 9 Ch. D. 178.

(*z*) *Oliver v. Court*, 8 Pri. 167, 168; *Gregory v. Gregory*, Coop. 201; *Hickes v. Cooke*, 4 Dow. 16; *Whalley v. Whalley*, 3 Bligh, 17; *Cholmondeley v. Clinton*, 4 Bligh, 1, 95; *Champion v. Rigby*, 9 L. J. Ch. N. S. 211; *Sibbering v. Earl of Balcarres*, 3 Deg. & S. 735; *Roberts v. Tunstall*, 4 Ha. 257; *Browne v. Cross*, 14 Beav. 106; *Hartwell v. Colvin*, 16 Beav. 140; *Baker v. Read*, 18 Beav. 398; *Wright v. Vanderplank*, 8 D. M. & G. 133; *Gresley v. Mousley*, 4 D. & J. 78; *Lyddon v. Moss*, ib. 104; *Harcourt v. White*, 28 Beav. 312; *Clegg v. Edmondson*, 8 D. M. & G. 810; *Clanricarde v. Henning*, 30 Beav. 175; *Wentworth v. Lloyd*, 32 Beav. 467; *Downes v. Jennings*, ib. 290; *Thompson v. Eastwood*, 2 App. Ca. 236.

(*a*) *Pickering v. Lord Stamford*, 2 Ves. Jr. 583; *Gregory v. Gregory*, Coop. 201; *Whalley v. Whalley*, 3 Bligh, 1, 13; *Roberts v. Tunstall*, 4

two propositions of bar by length of time, and bar by acquiescence, are not distinct propositions. They constitute but one proposition (*b*). Acquiescence, however, as distinguished from delay, imports conduct (*c*).

"The doctrine of laches in a Court of Equity," said the Court, in *Lindsey Petroleum Co. v. Hurd* (*d*), "is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to an evasion of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which would otherwise be just, is founded on mere delay, that delay, of course, not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable.

"Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy. If the situation of the parties has in no substantial way been altered, either by the delay, or by anything done during the interval, there is nothing to give special importance to the defence founded on time."

"I have looked in vain," said Lord Blackburn, in *Erlanger v. New Sombrero Phosphate Co.* (*e*), "for any authority which gives a more distinct and definite rule than the passage just cited; and I think, from the nature of the inquiry, it must always be a question of more or less depending on the degree

Ha. 257; *Life Association of Scotland v. Siddall*, 3 D. F. & J. 73. See *Stewart's Case*, 1 Ch. 513.

(*b*) *Life Association of Scotland v. Siddall*, 3 D. F. & J. 73, per Turner, L. J.

(*c*) *Lyddon v. Moss*, 4 D. & J. 104.

See *Murray v. Palmer*, 2 Sch. & Lef. 486; *Archbold v. Scully*, 9 H. L. 360.

(*d*) L. R. 5 P. C. 240. Lord Selborne was present at the hearing of the case.

(*e*) 3 App. Ca. 1279.

of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice and injustice is in favour of granting the remedy, or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty, but that is inherent in the nature of the inquiry."

The effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence. No mere delay short of the period fixed by the Statute of Limitations is sufficient to deprive a man of his right to rescind on the ground of fraud (*f*). Nor to an action for damages for deceit is there a bar arising from delay, unless the delay is such as would bring the Statute of Limitations applicable to the case into operation (*g*).

The rule that a man who sleeps on his rights cannot come to a Court of Equity for relief holds good, not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would have been given had there been no delay (*h*).

No precise or defined limit of time can be stated within which the interposition of the Court must be sought. What is a reasonable time cannot well be defined so as to establish any general rule, and must in a great measure depend upon the exercise of the sound discretion of the Court under all the circumstances of each particular case (*i*). In *Gregory v. Gregory* (*k*), Sir W. Grant, M. R., refused to set aside a purchase by a trustee after a lapse of eighteen years. So in *Selsey v. Rhoades* (*l*), where a lease was granted to a steward, and eleven years had elapsed, the Court refused to set the lease aside,

(*f*) *Redgrave v. Hurd*, 20 Ch. D. 13, per Jessel, M. R.

(*g*) *Peck v. Gurney*, 6 E. & I. App. Ca. 402, per Lord Cairns.

(*h*) *Beckford v. Wade*, 17 Ves. 87, 97.

(*i*) *Gresley v. Mousley*, 4 D. & J. 78; *Bagnall v. Carlton*, 6 Ch. D. 371.

(*k*) *Coop.* 201.

(*l*) 2 Sim. & St. 41; 1 Bligh, N. S. 1.

though there were special circumstances in the case. So in *Baker v. Reul* (*n*), a bill filed after the lapse of seventeen years to set aside a purchase of a testator's estate by his executor, at an undervalue, was dismissed on the ground of delay (*n*). But in *Kempson v. Ashbee* (*o*), where a young lady executed a bond as surety to secure the repayment of money by her stepfather, and some years afterwards executed a second bond as security for money due by him, the Court held that she was entitled, notwithstanding the lapse of thirteen years from the date of the first bond, to have the bonds delivered up to be cancelled. The question as to delay may be much affected by reference to the nature of the property (*p*), or to the change of circumstances as to the character or value of the property in the intermediate period (*q*). A delay which might have been of no consequence in an ordinary case, may be amply sufficient to bar the title of relief, when the property is of a speculative character, or is subject to contingencies (*r*), or where the rights and liabilities of others have been in the meantime varied (*s*), or where an innocent third party has acquired an interest in the matter, or where in consequence of the delay the position even of the wrongdoer is affected (*t*). If the property is of a speculative or precarious

(*m*) 18 Beav. 398.

(*n*) See *Parcell v. Macnamara*, 14 Ves. 91; *Oliver v. Court*, 8 Pri. 127; *Molony v. L'Estrange*, Beat. 406; *Gillett v. Peppercorn*, 3 Beav. 78; *Roberts v. Tunstall*, 4 Ha. 257; *Mathew v. Brise*, 14 Beav. 343; *Aspland v. Watte*, 20 Beav. 480; *Altfrey v. Altfrey*, 1 Mac. & G. 87; *Barwell v. Barwell*, 34 Beav. 371; *Potts v. Surr*, ib. 543; *Proctor v. Robinson*, 35 Beav. 335.

(*o*) 10 Ch. 15.

(*p*) *Hatch v. Hatch*, 9 Ves. 292; *Wright v. Vanderplank*, 8 D. M. & G. 133; *Clegg v. Edmondson*, ib. 807; *Ernest v. Vivian*, 33 L. J. Ch. 513.

(*q*) *Hickes v. Cooke*, 4 Dow. 16;

Wentworth v. Lloyd, 32 Beav. 467; *Ridgway v. Newstead*, 3 D. F. & J. 474.

(*r*) *Attwood v. Small*, 6 Cl. & Fin. 232, 357; *Walford v. Adie*, 5 Ha. 112; *Prendergast v. Torton*, 1 Y. & C. C. C. 98, 13 L. J. Ch. 268; *Clegg v. Edmondson*, 8 D. M. & G. 787; *Clements v. Hall*, 2 D. & J. 173; *Ernest v. Vivian*, 33 L. J. Ch. 513; *Rule v. Jewell*, 18 Ch. D. 660.

(*s*) *Ridgway v. Newstead*, 3 D. F. & J. 474. Where the lapse of time has not altered the position of the parties interested, it is of little or no importance. *Wollaston v. Tribe*, 9 Eq. 50; *Lord Beauchamp v. Winn*, 6 E. & L. App. Ca. 232.

(*t*) *Clough v. London & North*

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nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time (*u*). He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage (*x*). Parties who are in the position of shareholders in companies must, if they come to the Court to be released from their shares on the ground of fraud, come with diligence and promptitude (*y*). A man indeed who, after being fully aware of the false representation in the prospectus of a company, by which he has been induced to take shares, delays for an unreasonable time in taking proceedings to have his name removed from the list of shareholders cannot claim to be entitled, even after the creditors are paid, to be treated as between himself and the company, as if he were not a shareholder, and to have repayment upon that footing (*z*). So, also, in the case of companies formed under the Companies Act, 1862, persons who apply for shares on the faith of a prospectus are bound to ascertain at the earliest possible moment whether the memorandum and articles of association are in accordance with the prospectus. If they fail to do so, and the objects of the company are extended beyond those described in the prospectus, the persons who have so taken shares on the faith of the prospectus will be held bound by acquiescence (*a*).

It is difficult to lay down any general rule as to the time within which an objection on the ground of misrepresentation in the prospectus of a company should be made the ground of

Western Railway Co., L. R. 7 Exch. 34, *supra*, p. 5.

(*u*) *Jennings v. Broughton*, 5 D. M. & G. 126; *Ernest v. Virian*, 33 L. J. Ch. 513. *Comp. Langham v. East Wheel, &c., Mining Co.*, 37 L. J. Ch. 253.

(*x*) *Walford v. Adie*, 5 Ha. 112; *Prendergast v. Turton*, 13 L. J. Ch. 268; *Cowell v. Watts*, 19 L. J. Ch. 455; *Lawrence's Case*, 2 Ch. 425; *Rule v. Jewell*, 18 Ch. D. 660.

(*y*) *Ogilvie v. Currie*, 37 L. J. Ch.

541; *Kisch v. Central Railway Co. of Venezuela*, 2 E. & I. App. Ca. 125; *Reese River Silver Mining Co.*, 4 E. & I. App. Ca. 64; *Kent v. Frechold Land, &c., Co.*, 3 Ch. 493; *Shurpley v. Louth & East Coast Railway Co.*, 2 Ch. D. 685.

(*z*) *Ogilvie v. Currie*, 37 L. J. Ch. 541.

(*a*) *Oakes v. Turquand*, 2 E. & I. App. Ca. 352, *per* Lord Chelmsford; *Downes v. Ship*, 3 E. & I. App. Ca. 343.

repudiation of shares after it has been discovered. In every case attention must be paid to the circumstances (*b*). A delay pending the hearing and decision of the case of another shareholder in the same position, agreed to be taken as a representative case, was held not to prejudice the party, notwithstanding that a winding-up order intervened (*c*). So, also, in a case where, before the winding-up order, a large number of the shareholders repudiated and refused to pay the allotment money, and the company sent out a circular to say that in consequence of the proceedings at law taken by one of the shareholders, who had repudiated, they did not intend to sue them: it was held that one of the number who had repudiated was not debarred from taking proceedings to have his name removed from the list of shareholders by his delay in not taking proceedings until after the winding-up order, and after the result of the trial at law (*d*). But a shareholder who did not repudiate, but remained silent, and attended meetings, and took no steps in the matter until after the winding-up order and after the result of the trial, was held debarred by his delay from taking proceedings to have his name removed from the list of shareholders (*e*). -

In determining whether a shareholder has acted with sufficient diligence and promptitude, allowance will be made for a reasonable delay in taking proceedings. In *Kisch v. Central Railway Co. of Venezuela* (*f*), the shareholder who repudiated spent some months in examining the books and in investigating the affairs of the company, after first being put on inquiry and before bringing his action, and it was held that the time so employed was not sufficient to bar him from taking proceedings against the company.

In *Ogilvie v. Currie* (*g*), on the other hand, where shares had been allotted to a man in June, 1865, and he had full knowledge of the misrepresentations in the prospectus on the 30th of

(*b*) *Ogilvie v. Currie*, 37 L. J. Ch. 544, *per* Lord Cairns.

(*c*) *Purle's Case*, 4 Ch. 497.

(*d*) *McNeill's Case*, 10 Eq. 507.

(*e*) *Ashley's Case*, 9 Eq. 263.

(*f*) 3 D. J. & S. 122, 2 E. & I. App. Ca. 100.

(*g*) 37 L. J. Ch. 541.

May following, but took no steps to repudiate his shares till the 21st of July, it was held that he was barred by his delay.

The question as to delay may be also materially affected by reference to the relation which subsists between the parties. A delay which might be available by way of defence to persons not under any fiduciary relation or obligation may not be available to those who are affected by a fiduciary relation or obligation (*h*). If, for instance, the transaction be between solicitor and client, a delay which would be fatal in other cases may be permitted, for the solicitor must know that the onus of supporting the transaction will rest on him, and that, if he desire it to be upheld, he must preserve the evidence which will be required to uphold it (*i*).

The rules of the Court as to lapse of time being a bar in equity apply to cases of constructive trust (*j*), and even to transactions between trustee and *cestui que trust* in respect of the trust estate (*k*), as well as to ordinary transactions. Length of time can, however, have no effect between trustee and *cestui que trust*, except the trusts are properly executed (*l*). There is a wide distinction between trusts which are actual and express and constructive trusts. A trust by which a man undertakes to hold and apply property for the benefit of another is widely different from the case of ownership, subject to the claims of another, if he thinks proper to enforce it (*m*). In the case of a bribe received or profit made by a person in a fiduciary position, the *cestui que trust* who is wronged is not barred by any length of time, so long as that wrong is concealed from

(*h*) *Lindsey Petroleum Co. v. Hurd*, L. R. 5 P. C. 242; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Ca. 1248.

(*i*) *Gresley v. Mousley*, 4 D. & J. 78. See *McDonald v. McDonald*, 1 Bligh, 315; *Morgan v. Lewes*, 4 Dow. 29, 45; *Champion v. Rigby*, 9 L. J. Ch. N. S. 211; *Alfrey v. Alfrey*, 1 Mac. & G. 87. Comp. *Lyddon v. Moss*, 4 D. & J. 104.

(*j*) *Howenden v. Lord Annesley*, 2 Sch. & Lef. 633; *Beckford v. Wale*,

17 Ves. 97; *Ex parte Hasell*, 3 Y. & C. 617; *Clegg v. Edmondson*, 8 D. M. & G. 787; *Clanricarde v. Henning*, 30 Beav. 180.

(*k*) *Gregory v. Gregory*, Coop. 201; *Roberts v. Tunstall*, 4 Ha. 257; *Baker v. Read*, 18 Beav. 398; *Barwell v. Barwell*, 34 Beav. 371; but see *Smith v. Pakes*, 20 Beav. 568.

(*l*) *Franks v. Bollans*, 37 L. J. Ch. 155.

(*m*) *Toft v. Stephenson*, 7 Ha. 15.

nim by the wrongdoer; but a Court of equity will, whether by analogy or in obedience to the Statute of Limitations, hold the claim barred, if the *cestui que trust* stands by and takes no proceedings for six years from the time when he became aware of it. The money sought to be recovered in such a case is in no sense the money of the *cestui que trust*, unless it is made so by a decree founded on the act by which the trustee got the money into his hands. The case is different from that of a *cestui que trust* seeking to recover money which was his own before an act wrongfully done by the trustee (*n*). In the case of continuing express trusts, created by act of parties, no time is a bar, for from the privity existing between the parties, the possession of the one is the possession of the other, and there is no adverse title (*o*). Nor is length of time a bar where a debt has accrued in consequence of a violation of confidence bestowed in a fiduciary character (*p*). But if the trust, though express, be not continuous, and the case be one of gross laches, the general rule of equity, that encouragement is not to be given to stale demands, is equally applicable (*q*).

If there be laches on both sides, the ordinary rules as to delay and acquiescence may not apply (*r*).

Time, however, does not begin to run against a man in cases of fraud, until he has knowledge of the fraud. Time begins to run only from the discovery (*s*). The Statute of Limitations is no bar in equity in cases of fraud (*t*). The right of the party defrauded is not affected by lapse of time, or, generally speaking,

(*n*) *Metropolitan Bank v. Heiron*, 5 Exch. D. 323.

(*o*) *Cholmondeley v. Clinton*, 4 Bligh, 1; *Wedderburn v. Wedderburn*, 2 Keen, 749, 4 M. & C. 41; *Knight v. Bouyer*, 2 D. & J. 421, 443; *Clairricarde v. Hemming*, 30 Beav. 175. See *Att.-Gen. v. Fishmongers' Co.*, 5 M. & C. 16; *Life Association of Scotland v. Siddall*, 3 F. & J. 58, 73; *M'Donnell v. White*, 11 H. L. 570. See *Franks v. Bollans*, 37 L. J. Ch. 155.

(*p*) *Teed v. Bure*, 5 Jur. N. S. 381.

(*q*) *Bright v. Legerton*, 2 D. F. & J. 606; *Harston v. Tenison*, 20 Ch. D. 120. See *M'Donnell v. White*, 11 H. L. 570.

(*r*) *Hicks v. Morant*, 2 Dow. & Cl. 414.

(*s*) *Blennerhassett v. Day*, 2 Ba. & Be. 129; *Blair v. Bromley*, 5 Ha. 559, 2 Ph. 360; *Alfrey v. Alfrey*, 1 Mac. & J. 99; *Walsham v. Stainton*, 1 D. J. & G. 678; *Re Reese River Silver Mining Co., Smith's Case*, 2 Ch. 613.

(*t*) *Sturgis v. Morse*, 24 Beav. 541.

by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed (*u*). Lapse of time imputed as laches may be excused by the obscurity of the transaction, whereby a man is disabled from obtaining full information of his rights (*x*). Time does not begin to run against a man, so as to bar the remedy, until he has full information of his rights and injuries (*y*), or has in his possession full means of knowledge (*z*), or might by the exercise of reasonable diligence have obtained evidence of the fraud (*a*), or, at least, has sufficient notice to put him on inquiry (*b*), and, in cases where the transaction has taken place under pressure, or the exercise of undue influence, is emancipated from the dominion under which he stood at the date of the transaction (*c*). The objection of time is removed, so long as a man remains, without any fault of his own, in ignorance of his rights and injuries (*d*), or is under a legal disability (*e*), or so long as the dominion or undue influence which

(*u*) *Rolfe v. Gregory*, 4 D. J. & S. 579. See *Allfrey v. Allfrey*, 1 Mac. & G. 99.

(*x*) *Murray v. Palmer*, 2 Sch. & Lef. 486; *Erlanger v. New Sombbrero Phosphate Co.*, 3 App. Ca. 1231.

(*y*) *Salkeld v. Vernon*, 1 Eden, 64; *Blennerhassett v. Day*, 2 Ba. & Be. 104, 119; *Whalley v. Whalley*, 3 Bligh, 1; *O'Neill v. Hamill*, Beat. 618; *Trevelyan v. Charter*, 4 L. J. Ch. N. S. 209; *Charter v. Trevelyan*, 11 Cl. & Fin. 714; *Browne v. Cross*, 14 Beav. 106; *Parker v. Bloxam*, 20 Beav. 295; *Savery v. King*, 5 H. L. 627.

(*z*) *Browne v. McClintock*, 6 E. & I. App. Ca. 456; *Redgrave v. Hurd*, 20 Ch. D. 13. The fact, however, that a man has the means of knowledge is not the same thing as knowledge, if no culpable negligence can be imputed to him. *Earl Beauchamp v. Winn*, 6 E. & I. App. Ca. 233.

(*a*) *Chetham v. Hore*, 9 Eq. 571;

Vane v. Vane, 8 Ch. 383; *Willis v. Lord Howe*, 50 L. J. Ch. 4.

(*b*) *Clunricarde v. Henning*, 30 Beav. 175; *Spackman's Case*, 34 L. J. Ch. 321, 326; *Stanhope's Case*, 1 Ch. 161.

(*c*) *Gregory v. Gregory*, Coop. 201; *Addis v. Campbell*, 4 Beav. 401; *Champion v. Rigby*, 9 L. J. Ch. N. S. 211; *Bellamy v. Sabine*, 2 Ph. 425; *Grosvenor v. Sherratt*, 28 Beav. 659; *Sharp v. Leach*, 31 Beav. 491; *Kempson v. Ashbee*, 10 Ch. 15.

(*d*) *Trevelyan v. Charter*, 4 L. J. Ch. N. S. 209; *Charter v. Trevelyan*, 11 Cl. & Fin. 714; *Allfrey v. Allfrey*, 1 Mac. & G. 87; *Rolfe v. Gregory*, 4 D. J. & S. 579; *Spackman's Case*, 34 L. J. Ch. 329; *Stanhope's Case*, 1 Ch. 161.

(*e*) *Duke of Leeds v. Lord Amherst*, 2 Ph. 117; *Neesom v. Clarkson*, 2 Ha. 163; *Wright v. Vanderplank*, 8 D. M. & G. 133; *Gresley v. Mousley*, 4 D. & J. 78.

vitiated the transaction is in full force (*f*). The mere fact, however, of the poverty or pecuniary embarrassment of the injured or defrauded party, is not a sufficient excuse for delay (*g*): nor will the mere notice or assertion of a claim, unaccompanied by any act to give it effect, keep alive a right which would be otherwise barred (*h*).

The right of any person to bring a suit in equity for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such fraud shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered (*i*).

Laches may be set up against a company as well as against an individual. In considering the question of laches when set up against a company the Court cannot divest itself of the knowledge that a corporation is an aggregate of individuals. The knowledge of one shareholder is not the knowledge of the others, but great injustice might sometimes be done, if it were held that when it is shown that all the shareholders who paid reasonable attention to the affairs of the company had notice sufficient to make it laches in them not to act promptly, there could be no laches in the company, unless the notice was brought home to the company in its corporate capacity. But at the same time it should be recollected that shareholders who seek to set aside a contract made by the governing body have practically first to change that governing body, and must have time to do so (*k*).

Those, on the other hand, who deal inequitably with a company know that it must be necessarily slow in its proceedings, and are not entitled to complain that time elapses, and that it is not desirable to lay down such a rule as would practically

(*f*) *Wright v. Vanderplank*, 8 D. 639.

M. & G. 133; *Gresley v. Mousley*, 4 D. & J. 78; *Sharp v. Leach*, 31 Beav. 491; *Kempson v. Ashbee*, 10 Ch. 15.

(*g*) *Roberts v. Tunstall*, 4 Ha. 257; *Champion v. Rigby*, Tamil. 421, 9 L. J. Ch. N. S. 211. See *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607,

(*h*) *Clegg v. Edmondson*, 8 D. M. & G. 787; *Ernest v. Vivian*, 33 L. J. Ch. 513.

(*i*) 3 & 4 Wil. IV. c. 27, s. 26.

(*k*) *Erlanger v. New Sombroso Phosphate Co.*, 3 App. Ca. 1280, per Lord Blackburn.

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deprive a company when defrauded of relief; and this is a reason against considering a company as precluded from that relief to which it would be otherwise entitled on account of delay unless the delay is excessive (*l*).

"I can find no case," said Lord Blackburn (*l*), "in which even a private individual has been precluded by mere delay, except where the delay has been much greater than in this case. In *Prendergast v. Turton* (*m*) nine years elapsed, in *Clegg v. Edmondson* (*n*) nearly as long; and in both cases the plaintiff had lain by whilst the defendants were investing money in the mine, until that investment proved remunerative. It was clearly not equitable to leave the defendants to all the risk of loss and claim to themselves a profit, and this seems to be what Lord Eldon principally relied on in *Norway v. Row* (*o*). In the present case there is no ground for imputing to the plaintiff what Lord Lyndhurst in *Prendergast v. Turton* calls a conditional acquiescence. As it is pointed out in *Clarke v. Hart* (*p*) there was in *Prendergast v. Turton* very nearly if not quite a legal defence. Here, taking the time at which the active shareholders were put upon exerting diligence to be February, there was not quite nine months before the filing of the bill. That is not very long for getting the majority of shareholders to make an inquiry, turn out the board, and get proper advice before instituting a suit; and having come to the conclusion that the company once had the right to this relief, I think the burden is on the defendant to show that the company have precluded themselves from the relief to which they had a right."

When time has once begun to run against a man, all persons who derive their right through him will be affected with the disabilities which affected him (*q*). Nor can the representatives of a man be in a better position than the man himself (*r*). A

(*l*) 3 App. Ca. 1282.

(*m*) 1 Y. & C. C. C. 98.

(*n*) 8 D. M. & G. 789.

(*o*) 19 Ves. 144.

(*p*) 6 H. L. 658.

(*q*) *Clanricarde v. Henning*, 30 Beav. 175; *Ernest v. Vician*, 33 L.

J. Ch. 513. See *Murray v. Palmer*, 2 Sch. & Lef. 488; *Whalley v. Whalley*, 3 Bligh, 1.

(*r*) *Skottowe v. Williams*, 3 D. F. & J. 535. See *Bellw v. Bellw*, 1 Ba. & Be. 96.

remainderman may during the life of the tenant for life file a bill to impeach a sale under a decree, but he is not barred by laches, if he waits until the death of the tenant for life (s).

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SECTION V.—PURCHASE FOR VALUE WITHOUT NOTICE.

The right to impeach a transaction on the ground of fraud has no place as against third parties, who have paid money and acquired a legal right to property, without notice of the fraud. As against a purchaser for valuable consideration without notice, having the legal title, no relief can be had in equity. If a man has paid his money in ignorance of the fact that another party has an equitable claim to the property, a court of equity will not deprive him of the benefit of his legal title, even although his equitable claim be of later date than that of the other party (t). The rule that a man who advances money *bonâ fide*, and without notice of the infirmity of the title of the seller, will be protected in equity, applies equally to real estate, chattels, and personal estate (u). The rule is subject to no exceptions even in favour of charities (x).

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Where equities
are equal, legal
estate prevails.

A purchaser for valuable consideration without notice of any defect in his title, or of the existence of any prior equitable incumbrance at the time when he advanced his money, may buy in or obtain any outstanding legal estate, not held upon express trust for an adverse claimant, or a judgment, or any other legal advantage, the possession of which may be a protection to himself or an embarrassment to other claimants (y). But if a

(s) *Bowen v. Evans*, 1 J. & L. 265.

See *Case v. James*, 29 Beav. 512.

(t) *Lloyd v. Passingham*, Coop. 152; *Att.-Gen. v. Flint*, 4 Ha. 156; *Blackie v. Clark*, 15 Beav. 595; *Cobbett v. Brock*, 20 Beav. 528; *Dawson v. Princee*, 2 D. & J. 41; *Dodds v. Hills*, 2 H. & M. 424; *Pileher v. Ruelins*, 7 Ch. 271. See *Eyre v. Burmester*, 10 H. L. 90.

(x) *Att.-Gen. v. Wilkins*, 17 Beav. 293.

(u) *Joyce v. De Moleyns*, 2 J. & L. 377; *Dawson v. Princee*, 2 D. & J. 49; *Dodds v. Hills*, 2 H. & M. 424.

(y) *Saunders v. Dehew*, 2 Vern. 471; *Willoughby v. Willoughby*, 1 T. R. 763; *Jerrard v. Saunders*, 2 Ves. Jr. 458; *Maunderell v. Maunderell*, 10 Ves. 246; *Hughes v. Garner*, 2 Y. & C. 328; *Bates v. Johnson*, John. 304; *Sharples v. Adams*, 32 Beav. 213; *Monekton v. Braddisall*, 1. R. 7 Eq. 43.

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purchaser, however honest, on the completion of his purchase acquires a defective title, the Court will not allow this defective title to be strengthened either by his own fraud or the known fraud of any other person (z), or through further acts on the part of the person from whom he derives title, which would be a continuation of the fraud (a). "All cases in which the plea of purchase for valuable consideration," said Lord Justice Christian, in *Monckton v. Braddell* (b), "without notice has prevailed, have had in them this common element, that when the purchaser made his purchase, that is to say, acquired the beneficial right which he was seeking to protect by means of his legal estate, he had no notice whatever of the adverse title which subsequently revealed itself, his want of knowledge extending not merely to the personality of the claimant, but to the fact that any such title in the abstract existed at all."

Whatever may be the accident by which a purchaser has obtained a good legal title, and in respect of which he has paid his money, and is in possession of the property, he is entitled to the benefit of it (c); and even the execution of the conveyance having been procured by the fraud of a third party has not been allowed in equity to prejudice an innocent purchaser without notice, the deed remaining unimpeached at law (d).

Where the fraud
is by a person in
a fiduciary
character.

When a trustee of two different settlements misapplied the trust funds under one, and transferred the trust funds of the other to make good the misappropriation, it was held that the transfer was in effect an alienation for value without notice, and that the *cestuis que trustent* under the latter settlement could not follow the trust funds into the hands of the transferee (e). So also where A., solicitor of B. a mortgagee, put up the mortgaged estate for sale without his client's authority, and bought it himself, and then procured B., who had been informed of the sale, to execute a conveyance and sign the endorsed receipt for the purchase-money on the faith of representations which, how-

(z) *Heath v. Crealock*, 10 Ch. 33.

per James, L. J.

(a) *Ortigosa v. Brown*, 47 L. J. Ch. 168.

(d) *Hiorns v. Houlton*, 16 Beav. 259.

(b) 1 R. 7. Eq. 43.

(e) *Thorndike v. Hunt*, 3 D. & J.

(c) *Pilcher v. Rawlins*, 7 Ch. 270, 563.

ever, were not considered to be such as affected the validity of the deed at law, and A. afterwards deposited the title-deeds with C. as security for an advance, it was held that C. had priority over B. (f).

But if the trustee has executed a declaration in favour of the incumbrancer, or if his trust involves the discharge of active duties, he can only transfer the property subject to the trusts on which he holds it. Thus, when the person having the legal estate holds it in the character of trustee for several incumbrancers, he cannot make a priority by transferring it to any of them (g), and whenever the purchaser has notice of the existence of such a trust at the time of getting in the legal estate, he will take it subject to the claim of the *cestuis que trustent* (h).

Where the holder of a legal estate is an express trustee.

In *Carter v. Carter* (i) a devisee under a prior will which had without his knowledge been revoked by another executed subsequently, *bonâ fide* mortgaged his supposed estate. When the subsequent will was discovered, it appeared that under it the mortgagor had not the entire legal estate, but only an equitable estate for life subject to trusts. Lord Hatherley, as Vice-Chancellor, held that inasmuch as the instrument by which the legal estate was given disclosed the trusts on the production of it, a purchaser was bound by them, and could not rely on the legal estate as against the *cestuis que trustent*. That decision was questioned in *Pilcher v. Rawlins* (k). "My view of the principle," said Lord Justice James (l), "is that when once you have arrived at the conclusion that the purchaser is a purchaser for valuable consideration without notice, the Court has no right to ask him and has no right to put him to contest the question how he is going to defend himself or what he is going to rely on." In *Pilcher v. Rawlins* a trustee, the survivor of three who

Pilcher v. Rawlins.

(f) *Hunter v. Walters*, 7 Ch. 75.

(g) *Sharples v. Adams*, 32 Beav. 213. See *Maxfield v. Burton*, 17 Eq. 15; *Monckton v. Braddell*, 1. R. 7 Eq. 43.

(h) *Saunders v. Dehor*, 2 Vern. 271; *Allen v. Knight*, 5 Ha. 272, affd. 11 Jur. 527; *Mumford v. Stoh-*

vasser, 18 Eq. 556; *Monckton v. Braddell*, 1. R. 7 Eq. 43. See *Shropshire Union, &c., Canal Co. v. The Queen*, 7 E. & I. App. Ca. 504.

(i) 3 K. & J. 617.

(k) 7 Ch. 269.

(l) *Ib.*

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had lent trust money on mortgage (the mortgage deed mentioning that it was trust money), acting in concert with the mortgagor, procured the advance of money for which the second mortgage was granted by suppressing wholly the existence of the first mortgage, and representing the mortgagor as still seised of his original legal estate. The second mortgagees thus took their security in utter ignorance of the existence of the former. In that state of things, the first mortgagee having both priority of time and the legal estate, his precedence seemed incontestable : but a curious thing transpired and not until after the institution of the suit. It appeared that on the day of the date of the second mortgage, but before the execution, of it, the first mortgagee had executed a deed by which, in consideration of a part payment by the mortgagor on foot of the first mortgage, he, the first mortgagee, reconveyed a part of the mortgaged premises, by which means at the time of the execution of the second mortgage, the mortgagor had got back in law again his legal estate in that part, which accordingly passed to the second mortgagee. The existence of this deed, as well as of the first mortgage, was wholly unknown to him. When it was discovered, he claimed the benefit of the legal estate which accident had thus thrown upon him ; and the question was, whether, inasmuch as to deduce his title to it, he must rely on the first mortgage and the reconveyance of it, which on the face of them disclosed the trusts of the settlement which bound the mortgage money, the case was not governed by Lord Hatherley's decision in *Carter v. Carter* (*n*), and so his plea be excluded. But the decision was that, inasmuch as, when he took his mortgage, he was wholly innocent of notice of the first mortgage, or its trusts, he was entitled to rely on the windfall which wholly without his knowledge had fallen to him in the shape of this accidental legal estate, and that the notice which did not come to him until after his purchase had been completed was immaterial.

Lord Hatherley concurred with the Lords Justices in the judgment in *Pilcher v. Rawlins*, but said the case differed in many respects from *Carter v. Carter*, inasmuch as the *cestuis*

que trustent by their negligence in allowing the trustee who was originally one of three to become sole trustee had put it into his power to commit a fraud, and inasmuch as the mortgagee had acquired the legal estate and entered into possession of the property without notice of the prior charge. He adhered to his decision in *Carter v. Carter*, though it was disapproved of by the Lords Justices, and said: "I know of no case before or since *Carter v. Carter* in which the legal estate so conveyed to the purchaser was held by the vendor on express trusts appearing on the face of the only instrument under which the vendor could make a complete title, so that a trustee of a settlement comprising estates of any magnitude and being in possession on behalf of a minor, for instance, could by forging a conveyance pass an indefeasible title to a purchaser" (n).

Lord Justice Mellish thought that if *Carter v. Carter* was to be supported, it must be on the ground that there were such peculiar circumstances in the case as to make it inequitable that the purchaser should be allowed to rely upon the second will. But he said that he was of opinion that "where a trustee in breach of trust conveys away a legal estate which he possesses and that legal estate comes into the possession of a purchaser for value without notice, that purchaser can hold the property against the *cestui que trust* who was defrauded by the conveyance of the trustee; and that it makes no difference whatever that if the purchaser is challenged in a Court of law and an action of ejectment is brought against him, he may have to rely upon some deed which was in fact concealed from him and of which he had neither knowledge nor the means of knowledge" (o). Lord Justice James dissented unequivocally from *Carter v. Carter*, and asserted the broader doctrine given above.

The protection from getting in the legal estate extends even to cases where the apparent or asserted equitable title is deduced through a forged instrument (p); provided the asserted

Protection of legal estate extends to cases where vendor had no title in equity.

(n) See *Monckton v. Braddell*, I. R. 7 Eq. 43.

(o) 7 Ch. 274.

(p) *Jones v. Powles*, 3 M. & K. 581; *Darson v. Prince*, 2 D. & J. 41. See *Lloyd v. Passingham*, Coop.

152; *Bowen v. Evans*, 1 J. & L. 264; *Lloyd v. Attwood*, 3 D. & J. 655; *Monckton v. Braddell*, I. R. 7 Eq. 43. *Comp. Esdaile v. La Nauze*, 1 Y. & C. 400.

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or apparent title of the party from whom it was derived was clothed with possession (*q*). If the asserted or apparent title is deduced through a forged instrument, or through an instrument which has been obtained by a trick or a cheat, the doctrine of purchase for value without notice cannot apply, unless the party from whom the title is deduced had taken possession, and being in possession, as apparent owner, had sold and conveyed for value (*r*).

To raise the equity of purchase for value without notice, it is not necessary to prove possession. It is enough that the purchase be from an apparent owner who was actually in possession (*s*). If, however, an instrument, which purports to convey a legal estate or interest, be a forged instrument, no title can be acquired under it. A man who takes under such an instrument has no title at all, and cannot claim as a purchaser without notice (*t*). If the indorsement on a bill of exchange be forged, it is the same as if there were no indorsement at all; nor will a real indorsement by the payee after the bill has arrived at maturity, give the holder any title, if the original indorsement was a forgery (*u*).

Notice of another having better right to call for legal estate is notice of all equities.

The legal estate will not protect a purchaser against the claims of persons whose prior right to its protection was known to him before completion of the purchase, even although the extent of such claims were unknown: for instance, when A., knowing that B. had a charge on the property, accepted a mortgage of the estate, relying on the mortgage's covenant, and then got in an old outstanding term of years, it was held that B., having in respect of A.'s notice of the first incumbrance, a preferable right to require an assignment of the term, was entitled to priority not only in respect of such first incumbrance, but also in respect of a subsequent charge of which A. had no notice at

(*q*) *Jones v. Powles*, 3 M. & K. 596; *Ogilvie v. Jeaffreson*, 2 Giff. 380. See *Cottam v. Eastern Counties Railway Co.*, 1 J. & H. 248; *Young v. Young*, 3 Eq. 801.

(*r*) *Ogilvie v. Jeaffreson*, 2 Giff. 380.

(*s*) *Wulbrynn v. Lee*, 9 Ves. 24;

Ogilvie v. Jeaffreson, 2 Giff. 379.

(*t*) *Esdaile v. La Nauze*, 1 Y. & C. 399; *Johnston v. Renton*, 9 Eq. 181. See *Cottam v. Eastern Counties Railway Co.*, 1 J. & H. 248.

(*u*) *Esdaile v. La Nauze*, 1 Y. & C. 399.

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the date of his advance (x). So where a man bought a freehold messuage which was subject to three mortgages, two only of which were disclosed to him, and took an assignment and paid the purchase money by cheque, but shortly afterwards having some misgiving stopped the cheque and then for the first time had actual notice of the third incumbrance, but eventually under threats of legal proceedings allowed the cheque to be paid to the vendor, it was held that he was not a purchaser without notice and that he was bound to redeem the third mortgage (y). In one case a transfer of shares to a mortgagee who had no notice of a trust affecting them was upheld, notwithstanding that he received notice before the transfer was registered (z).

A purchaser by paying off and getting in a legal estate from an unsatisfied mortgagee may hold it as against all mesne incumbrances of which he had no notice at the time of completion, and this may be done *pendente lite* at any time before decree to settle priorities (a). But an equitable incumbrancer cannot

Unsatisfied mortgagee.

after receiving notice of a prior equitable incumbrance obtain priority over it by getting in a legal estate from a bare trustee (b).

Legal estate of bare trustee.

The doctrine in regard to the effect of notice, does not affect a title derived from another person, in whose hands it stood free from any such taint. A purchaser will not be affected by notice of an equitable claim, if he purchase from a vendor who himself bought *bonâ fide* without notice (c). A *bonâ fide* purchaser for value without notice has a right to convey to a person even with notice any legal or equitable interest which he has acquired, and a person acquiring such legal or equitable interest under such purchaser, has a valid title to it (d). So, also, if a person who has notice sells to another who has no notice, and is, also, a *bonâ fide* purchaser for valuable consideration, the latter

Person affected by notice has benefit of want of notice by intermediate purchaser.

(x) *Willoughby v. Willoughby*, 1 T. R. 763.

(y) *Tildesley v. Lodge*, 3 Sm. & G. 543.

(z) *Dodds v. Hills*, 2 H. & M. 424.

(a) *Bates v. Johns*, John. 315

(b) *Harpham v. Shacklock*, 19 Ch. D. 207.

(c) *Harrison v. Forth*, Prec. Ch. 51, 1 Eq. Ca. Ab. 331, pl. 6; *Lowther v. Carlton*, 2 Atk. 242; *Brandlyn v. Ord*, 1 Atk. 571; *Sweet v. Southcote*, 2 Bro. C. C. 66; *Andrew v. Wrigley*, 4 ib. 125.

(d) *Kettlewell v. Watson*, 21 Ch. D. 707.

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Purchaser with notice of facts which ought to have put him on inquiry cannot claim as purchaser without notice.

may protect his title, although it was affected with the equity arising from notice in the hands of the person from whom he received it (*e*). A person affected by notice has the benefit of want of notice by intermediate purchasers (*f*). The *bona fide* purchase of an estate for valuable consideration, purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the meditated fraud. If the estate becomes revested in him, the original equity will attach to it in his hands (*g*). A purchaser, however, having notice, cannot insist on holding the legal estate as against those parties with notice of whose right that estate was taken (*h*). A man who has notice of a fact which ought to have put him on inquiry, and which he might have discovered by using due diligence, cannot claim as a purchaser without notice (*i*). If a purchaser chooses to rest satisfied without the knowledge which he has a right to require, he cannot claim as a purchaser without notice (*k*). Nor can a man who has by his own act precluded himself from the means of knowledge, or from information, set up, as against persons as innocent as himself, the want of information which he has precluded himself from obtaining (*l*). A purchaser, for example, who buys with notice of circumstances sufficient to invalidate the sale, is not protected by a proviso that the purchaser need not inquire (*m*). So, also, a man who takes the assignment of a lease under a condition not to inquire into the lessor's title, must have imputed to him the knowledge which, on prudent inquiry, he would have obtained (*n*). Nor

(*e*) *Ferrars v. Cherry*, 2 Vern. 384 ; *Mertins v. Jolliffe*, Amb. 313 ; *Lowther v. Carlton*, Barnard, Ch. 358, For. 187, 2 Atk. 242. See *Dodds v. Hills*, 2 Ha. & M. 424.

(*f*) *McQueen v. Farquhar*, 11 Ves. 467.

(*g*) *Kennedy v. Duly*, 1 Sch. & Lef. 379. Comp. *Carter v. Carter*, 3 K. & J. 617 ; *Bates v. Johnson*, John. 309.

(*h*) *Allen v. Knight*, 5 Ha. 278.

(*i*) *Jackson v. Rowe*, 2 Sim. & St.

475 ; *Jones v. Powles*, 3 M. & K. 596 ; *Ker v. Lord Dungannon*, 1 Dr. & War. 542 ; *Robinson v. Briggs*, 1 Sm. & G. 188 ; *Davies v. Thomas*, 2 Y. & C. 234 ; *Jenkins v. Jones*, 2 Giff. 99 ; *Ogilvie v. Jeaffreson*, ib. 378 ; *Marfield v. Burton*, 17 Eq. 18.

(*k*) *Parker v. Whyte*, 1 H. & M. 167.

(*l*) *Nicoll's Case*, 3 D. & J. 387.

(*m*) *Jenkins v. Jones*, 2 Giff. 99.

(*n*) *Robson v. Flight*, 4 D. J. & S. 608 ; *Clements v. Welles*, 1 Eq. 200.

are special conditions of sale, limiting the extent of title, an excuse for a purchaser not insisting on the production of a deed beyond those limits of which he had notice (*o*). Trustees of a settlement for the benefit of a particular person, cannot stand any higher than the person for whom they are trustees in respect of notice. If he is affected by notice, they cannot claim as purchasers for value without notice (*p*).

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A purchaser for value who though not having any personal knowledge of a fraud contracts through an agent who knows of the fraud is not a *bonâ fide* purchaser for value without notice (*q*). But if the solicitor who is acting for the purchaser is committing such a fraud in the transaction that notice of the fraud cannot be imputed to the purchaser, the Court will consider him a purchaser for value without notice (*r*).

Purchaser for value affected by agent's knowledge of fraud.

Purchasers under a decree of the Court take with notice of fraud apparent on the face of the decree (*s*). A decree is no protection against persons of whom the purchaser has actual notice that they ought to have been, but are not, parties to the suit (*t*). But a purchaser under a decree will not be affected by fraud in the proceedings of which he himself is innocent (*u*), unless it be apparent on the face of the decree (*x*). Nor is a sale impeachable on the ground of its having been the object for which the suit, professedly directed to other purposes, was in fact instituted (*y*).

Purchasers under a decree affected by notice.

To entitle a man to the character of a *bonâ fide* purchaser without notice, he must have acquired the legal title, and have actually paid the purchase-money, or parted with something of value by way of payment before receiving notice (*z*). A

Actual payment of purchase moneys necessary.

(*o*) *Peto v. Hammond*, 30 Beav. 495.

& War. 177.

(*p*) *Spaight v. Cowne*, 1 H. & M. 359.

(*u*) Sug. 110; Dart, 1224; *Bowen v. Evans*, 1 J. & L. 178, 2 H. L. 257; *Edgeworth v. Edgeworth*, 12 Ir. Eq. 81.

(*q*) *Vane v. Vane*, 8 Ch. 399.

(*r*) *Waddy v. Gray*, 20 Eq. 251.

(*x*) *Gore v. Stackpoole*, 1 Dow. 30, cit. 1 J. & L. 257.

(*s*) *Toulmin v. Steere*, 3 Mer. 210; *Gore v. Stackpoole*, 1 Dow. 30, cit. 1 J. & L. 247.

(*y*) *Bowen v. Evans*, 1 J. & L. 178, 2 H. L. 257.

(*t*) *Coleclough v. Sterum*, 3 Bligh, 181, 186; *Piers v. Piers*, 1 Dr. & Wal. 265; *Rolleston v. Morton*, 1 Dr.

(*z*) *How v. Weldon*, 2 Ves. 516; *Story v. Lord Windsor*, 2 Atk. 630; *Molony v. Kernan*, 2 Dr. & War. 31;

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party claiming to be a purchaser for value without notice under a marriage contract, entered into in pursuance of articles, must show that he had no notice at the time of the settlement; proof that he had no notice at the time of the articles is not sufficient (*a*). The protection to which a *bonâ fide* purchaser without notice is entitled, extends only to the money which has been actually paid, or to the securities which have been actually appropriated by way of payment before notice (*b*). Notice before the actual payment of all the purchase-money, although it be secured (*c*), and the execution of the conveyance (*d*), is binding in the same manner as notice had before the contract. Although, however, a purchaser after conveyance executed, has no remedy at law against the payment of money for which he has given security, he may come into equity to have the money so secured employed in discharge of newly discovered incumbrances (*e*).

Notice before
conveyance but
after payment of
purchase moneys

It has been held that notice to a purchaser after payment of the purchase-money, but before execution of the conveyance, is sufficient to deprive him of the benefit of the legal estate (*f*). The point, however, is one which will require much consideration when it arises again (*g*).

Best right to call
for legal estate
a protection in
equity.

When a purchaser, not having got in an outstanding legal estate, has, nevertheless, from having a better equity than the other claimants, the best right to call for it, he will, in equity, be entitled to its protection (*h*). But although the Court holds that priority will give equity, yet it does not hold that it gives

Borell v. Dann, 2 Ha. 440; *Rayne v. Baker*, 1 Giff. 245. See *Whitworth v. Gauguin*, Cr. & Pl. 325; *Att.-Gen. v. Flint*, 4 Ha. 137, 156.

(*a*) *Darves v. Thomas*, 2 Y. & C. 234.

(*b*) *Story v. Windsor*, 2 Atk. 630; *Hardingham v. Nicholls*, 3 Atk. 304; *Rayne v. Baker*, 1 Giff. 245.

(*c*) *Tourville v. Naish*, 3 P. Wm. 307; *Story v. Lord Windsor*, 2 Atk. 630; *Moore v. Mayhew*, 1 Ch. Ca. 34; *Hardingham v. Nicholls*, 3 Atk. 304; *Tildesley v. Lodge*, 3 Sm. & G.

543. Comp. *Oregan v. Cullen*, 16 Ir. Ch. 339.

(*d*) *Jones v. Stanley*, 2 Eq. Ca. Ab. 685. See *Allen v. Knight*, 5 Ha. 272, 11 Jur. 527.

(*e*) *Tourville v. Naish*, 3 P. Wm. 306.

(*f*) *Wigg v. Wigg*, 1 Atk. 382.

(*g*) *Dart, V. & P.* 831.

(*h*) *Willoughby v. Willoughby*, 1 T. R. 768; *Bowen v. Evans*, 1 J. & L. 265; *Parker v. Carter*, 4 Ha. 410; *Dart, V. & P.* 831.

so superior an equity, as between several incumbrancers and purchasers, as to enable the anterior claimant to wrest the legal estate from the person who has obtained it without notice of the anterior claim (*i*).

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The defence of purchase for value without notice is a shield as well against a legal title as an equitable title (*k*). The principle, in other words, applies as well where the right sought to be enforced is a legal right as where it is an equitable one (*l*).

Purchase for value without notice available against a legal title.

The defence of purchase for valuable consideration without notice, will not prevent the Court from protecting property by injunction, pending litigation (*m*).

Injunction notwithstanding defence of purchase for value without notice.

Questions relating to the defence of purchase for valuable consideration without notice, are much modified by the operation of the act for rendering unnecessary the assignment of satisfied terms. If the term is gone, it will not stand in the way of the petitioner even at law (*n*).

Effect of act for rendering satisfied terms unnecessary.

A plea of purchase without notice is as available to a purchaser with an equitable estate only as to one with the legal estate (*o*). But as between persons claiming merely equitable interests, the defence of purchase for value without notice has no place. The first grantee of an equity has the right to be paid first, and it is quite immaterial whether the subsequent incumbrancers had at the time they took their securities and paid their money, notice of a prior incumbrance (*oo*).

Purchase for value without notice no defence as between persons claiming mere equities.

"I think it to be a clear proposition," said Lord Westbury, in *Philipp's v. Philipp's* (*p*), "that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant

(*i*) *Rooper v. Harrison*, 1 K. & J. 75.
108, 109.

(*k*) *Joyce v. De Moleyns*, 2 J. & L. 374.

(*l*) *Att.-Gen. v. Wilkins*, 17 Beav. 203; but see *Philipp's v. Philipp's*, 4 D. F. & J. 217.

(*m*) *Greenslade v. Dare*, 17 Beav. 502.

(*n*) *Colyer v. Finch*, 19 Beav. 500; *Corry v. Cremorne*, 12 Ir. Ch. 136.

(*o*) *Colyer v. Finch*, 5 H. L. 905; *Hunter v. Walters*, 11 Eq. 314, 7 Ch.

(*oo*) *Fraser v. Jones*, 17 L. J. Ch. 353, 356; *Rooper v. Harrison*, 2 K. & J. 108, 109; *Ford v. White*, 16 Beav. 120; *Stackhouse v. Countess of Jersey*, 1 J. & H. 721; *Case v. James*, 3 D. F. & J. 264; *Parker v. Clarke*, 30 Beav. 54; *Cory v. Eyre*, 1 D. J. & S. 167; *Philipp's v. Philipp's*, 4 D. F. & J. 215; *Bradley v. Riches*, 9 Ch. D. 193.

(*p*) 4 D. F. & J. 215.

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of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable interest (the legal interest being outstanding) makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, namely, the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence, grantees and incumbrancers claiming equity take and are ranked according to the date of their securities, and the maxim applies, *Qui prior est tempore, potior est jure*."

The rule, however, that as between equities priority of time gives the better equity is not an absolute rule, but is subject to the condition that the equity which ranks prior in point of time is an equity of equal rank in all other respects with the equity which ranks later in point of time. If after a close examination of all the circumstances of the case there appears to be nothing to give the one a better equity than the other, then and then only resort must be had to the maxim, *Qui prior est tempore, potior est jure* (q). "The meaning of the rule," said Kindersley, V.-C. (r), "is this, that in a contest between persons having only equitable interests, priority in time is the ground of preference last resorted to, i.e., that a court of equity will not prefer the one to the other on the mere ground of priority of time until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or in other words that their equities are in all other respects equal, and that if the one has on other grounds a better equity than the other, priority of time is immaterial" (s). In a case in which the authorities were fully reviewed the rule was thus stated by Lord Justice Giffard: "As between equitable incumbrancers, relief will be given to the incumbrancer prior in point of date, unless he has lost his priority by some act or neglect of his own; and relief will not be refused him as against

(q) *Rice v. Rice*, 2 Drew. 85.

(r) *Ib.* 78.

(s) See *Frazer v. Jones*, 17 L. J. Ch. 355; *Att.-Gen. v. Flint*, 4 Ha.

150; *Case v. James*, 3 D. F. & J. 263; *Shropshire Union, &c., Canal Co.*, 7 E. & I. App. Ca. 510; *Bradley v. Riches*, 9 Ch. D. 193.

a subsequent incumbrancer on the sole ground of the latter being a purchaser for value without notice, unless he has the legal estate or the best right to call for it" (t).

As between two persons whose equitable interests are of precisely the same nature and quality, and in that respect precisely equal, the possession of the title-deeds gives the better equity. But the possession of the title-deeds will not in all cases and under all circumstances give the better equity (u). The deeds may be in the possession of a party in such a manner and under such circumstances that such possession will confer no advantage whatever. For example, in *Allen v. Knight* (x), deeds had been delivered to the first equitable mortgagee, and by some unexplained means they had got back into the possession of the mortgagor, who delivered them to a subsequent equitable incumbrancer. It was insisted by the latter that it must be presumed that it was by the fault or neglect of the first mortgagee that the deeds had got out of his possession, or that at all events the Court should direct an inquiry as to the circumstances. But the Court held that the *onus* lay on the second mortgagee of proving such alleged fault or neglect of the first mortgagee, and as he had failed to prove it, the Court could not presume it nor direct an inquiry on the subject, and decreed in favour of the first mortgagee. So the deeds may have come into the hands of a subsequent equitable mortgagee by means of an act committed by another person which constituted a breach of an express trust as against the person having the prior equitable interest. In such a case it would be contrary to the principles of a court of equity to allow the subsequent mortgagee to avail himself of the injury which had been thus done to the party having the prior equitable estate or interest (y). In all cases of contests between persons having equitable interests, the conduct of the parties and all the circumstances must be taken into consideration in order to determine which has the better equity; and if it appear, after

(t) *Thorpe v. Holdsworth*, 7 Eq. 146.

(x) 5 Ha. 272; affd. 11 Jur. 527.

(u) *Rice v. Rice*, 2 Drew. 81;

(y) *Rice v. Rice*, 2 Drew. 82, *per*

Thorpe v. Holdsworth, 7 Eq. 139.

Kindersley, V.-C.

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a close examination of all these matters, that there has been some default or neglect on the part of the first mortgagee or incumbrancer, the possession of the deeds will give the better equity (z).

As between a vendor's lien for unpaid purchase-money and an equitable mortgagee by deposit of deeds, the equities being of equal rank, that which is prior in date will according to the general rule be preferred (a). So also the right of the *cestui que trust* to follow into land trust monies which have been misappropriated by the trustee being an equitable lien of the same quality as an equitable mortgage by deposit of deeds, the claim of the *cestui que trust*, when prior in point of date, has priority over the claim of the equitable mortgagee, though a purchaser for value without notice (b). So when bankers took an equitable mortgage by deposit of title-deeds of an estate which was subject to a secret trust of which they had no notice, it was held that such trust must prevail against their security (c). In a case however accompanied by circumstances of a very complicated nature, it was held that the rule, *Qui prior est tempore, potior est jure*, could not be applied, and that a purchaser for value without notice, by deposit of title-deeds, though subsequent in date, was entitled to priority (d).

A *bond fide* equitable mortgagee by deposit of deeds has priority as against a subsequent mortgagee who has the legal estate (e). When a man in depositing deeds with his banker to secure the balance of his account has executed a memorandum whereby he agreed at their request to execute any deed necessary for legally carrying out the security, he cannot deprive them of priority by conveying the property to a party with whom he has entered into a subsequent contract for value, even though such party was a purchaser without notice (f).

The assignee of a chose in action cannot set up the defence

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| (z) <i>Rice v. Rice</i> , 2 Drew. 82. | <i>Jersey</i> , 1 J. & H. 721. |
| (a) <i>Ib.</i> | (d) <i>Keate v. Philipps</i> , 18 Ch. D. 570. |
| (b) <i>Cave v. Cave</i> , 15 Ch. D. 643. | (e) <i>Barnard v. Bywater</i> , 17 W. R. 71. |
| See <i>Bradley v. Riches</i> , 9 Ch. D. 193. | (f) <i>Maxfield v. Burton</i> , 17 Eq. Ha. 156; <i>Stackhouse v. Countess of</i> |

of purchase for value without notice as against equities which attached to the security in the hands of the assignor (*g*).

There may be such dealings between the assignee and the party liable originally as to preclude him from insisting as against the assignee upon rights which he might have claimed as against the assignor: but, as a general rule, a person who buys a chose in action takes subject to the equities which affect the assignor, even although he be a *bond fide* purchaser without notice (*h*). Where, accordingly, a man bought in the market, in the ordinary course of business, debentures which had been issued in fraud of a company, the fact that the transfer of the debentures had been registered in the books of the company, and interest had been paid on them, and that the holder was a *bond fide* purchaser without notice, was held not to affect the application of the rule, and the holder of them was restrained from suing at law upon them (*i*). The rule that a man who purchases a chose in action takes it subject to the equities, which attach to it in the hands of the assignor, applies even where the person himself who asserts the equity has created the interest under which the assignee claims it (*k*). Where, accordingly, A. mortgaged a fund in Court to B., and afterwards joined B. in a sub-mortgage to C., and it was decided that the mortgage to B. was fraudulent and void, it was held void as to C., and that neither A.'s concurrence in the first nor second mortgage prevented him from insisting on the invalidity of the transaction, he not being aware of his rights (*l*).

(*g*) *Coles v. Jones*, 2 Vern. 693; *Turton v. Benson*, 1 P. Wms. 496; *Cator v. Burke*, 1 Bro. C. C. 434; *Pridly v. Rose*, 3 Mer. 86; *Jennings v. Bond*, 2 J. & L. 740; *Mungles v. Dixon*, 3 H. L. 702; *Cockell v. Taylor*, 15 Beav. 103; *Morris v. Livie*, 1 Y. & C. C. C. 380; *Smith v. Parkes*, 16 Beav. 115; *Cluck v. Holland*, 19 Beav. 262; *Athenæum Life Assurance Society v. Pooley*, 3 D. & J. 294.

(*h*) *How v. Weldon*, 2 Ves. 516; *Cockell v. Taylor*, 15 Beav. 103; *Athenæum Life Assurance Society v.*

Pooley, 3 D. & J. 294.

(*i*) *Ib.* Comp. *Ashwin v. Burton*, 9 Jur. N. S. 319; *Hulett's Case*, 2 J. & H. 306; *Woodhams v. Anglo-Australian, &c., Co.*, 3 Giff. 238, 2 D. J. & S. 168; *Dodds v. Hills*, 2 H. & M. 424. See also *Pinkett v. Wright*, 2 Ha. 137, S. C. on appeal, *Murray v. Pinkett*, 12 Cl. & Fin. 780; *Moore v. Jervis*, 2 Coll. 60; *Morris v. Livie*, 1 Y. & C. C. C. 380; *Barnett v. Sheffield*, 1 D. M. & G. 371.

(*k*) *Cockell v. Taylor*, 15 Beav. 119.

(*l*) *Ib.* 103.

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Notice of
equitable
interests in land.

Delivery up of
title deeds.

As respects equitable interests in land, the priority of a purchaser or incumbrancer is not affected by his giving or neglecting to give notice of his purchase or security to the trustees, mortgagees, or other persons in whom the legal estate may happen to be vested. The ordinary rule as to notice of assignments of *choses in action* does not apply in such cases (*m*).

Under the former procedure the Court of Chancery would not as against a purchaser for value without notice give any assistance to the legal title or deprive him of anything which he had honestly acquired (*n*). If he had got possession of title deeds or of land, or of anything else which he had got honestly, the Court of Chancery would not interfere with him or deprive him of the possession (*nn*). But under the new procedure, a Court of the Chancery Division has jurisdiction on the application of the owner of the legal estate to order title-deeds to be delivered up by a purchaser for value without notice (*o*).

When the Court is called upon to establish a prior equitable title to the estate, it will not permit its decree that a prior equitable claimant is entitled to the possession of the estate which of itself confers the right to the possession of the deeds (*p*) to be deprived of its full efficacy by allowing them to remain in the hands of a defendant who claims under an adverse title which the Court declares to be invalid (*q*). In *Thorpe v. Holdsworth* (*r*) Lord Justice Giffard said that had the case been *res integra* he would have made the order that deeds in the possession of an equitable incumbrancer for value without notice should be delivered up to a person entitled to a prior equitable charge, but that he could not do so upon the authority of *Joyce v. De Moleyns*. But he made a declaration that the prior incumbrancer was entitled to have his security realised in

(*m*) *Wilmot v. Pike*, 5 Ha. 14 ;
Bugden v. Bignold, 2 Y. & C. C. C.
392 ; *Rooper v. Harrison*, 2 K. & J.
86.

(*n*) *Philipps v. Philipps*, 4 D. F. &
J. 217 ; *Heath v. Crealock*, 10 Ch. 33.

(*nn*) *Ib.*

(*o*) *Cooper v. Vesey*, 20 Ch. D. 629.

(*p*) *Smith v. Chichester*, 2 Dr. &
War. 401.

(*q*) *Newton v. Newton*, 6 Eq. 135,
4 Ch. 143 ; but see *Heath v. Crealock*,
10 Ch. 33.

(*r*) 7 Eq. 146.

priority to the equitable mortgagee by deposit of deeds, and ordered the property to be sold, making at the same time an order that the holder of the deeds should produce them for the purposes of the sale (s).

The rule that a *bonâ fide* purchaser without notice may buy Tacking. in, or obtain for his protection against other claimants an outstanding legal estate, or other legal advantage, is the foundation of the equitable doctrine of tacking, as it is technically called, that is, uniting securities given at different times, so as to prevent any intermediate purchaser from claiming a title to redeem, or otherwise to discharge one lien which is prior in date without redeeming or discharging the other liens also which are subsequent to his own title (t). Thus, if a third mortgagee, without notice of a second mortgage at the time when he lent his money, should purchase in the first mortgage, by which he would acquire the legal title, the second mortgagee cannot redeem the first mortgage without redeeming the third mortgage also. It is immaterial that the third mortgagee may have had notice of the second mortgage at the time of purchasing in the first mortgage, provided he had no such notice at the time he advanced his money (u). The absence of notice at the time of the advance is the ground of the equity (x). The legal estate, accordingly, of the first mortgagee will not protect subsequent interests purchased with notice of mesne incumbrances. A man purchasing an equity of redemption cannot set up a prior mortgage of his own, or a mortgage which he has got in against subsequent incumbrances of which he had notice (y).

(s) But see *Heath v. Crealock*, 10 Ch. 33; *Waddy v. Gray*, 20 Ch. 254.

(t) *Jeremy Eq. Jur. b. 1, c. 2, s. 1*; *Story, Eq. Jur.* 412.

(u) *March v. Lee*, 1 Ch. Ca. 162; *Morrett v. Paske*, 2 Atk. 52; *Wortley v. Birkhead*, 2 Ves. 571; *Lacey v. Ingle*, 2 Ph. 419; *Rooper v. Harrison*,

2 K. & J. 86; *Bates v. Johnson*, John. 304. See *Lloyd v. Attwood*, 3 D. & J. 614.

(x) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Hopkinson v. Rolt*, 9 H. L. 514. See *London & County Banking Co. v. Ratcliff*, 6 App. Ca. 739.

(y) *Toulmin v. Steere*, 3 Mer. 224.

CHAPTER VII.

REMEDIES.

SECTION I.—RESCISSION, AND OTHER REMEDIES OF A LIKE CHARACTER.

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IF a contract for sale or purchase of goods, chattels, or real estate be induced by false and fraudulent representations, or a transaction be in any way tainted by fraud, and the defrauding party is party to the contract or transaction, the party defrauded has a right at his election, after knowledge of the fraud, to rescind and avoid the contract or other transaction, and to recover back what he has paid, or sold, or conveyed, provided always the parties can be restored to the position in which they stood before or at the time of the contract or transaction (*a*), for it would be unjust that a person who has been in possession of property under the contract or transaction, which he seeks to repudiate, should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration (*b*).

The effect of the avoidance of an agreement on the ground of fraud, is to place the parties in the same position as if it had never been made, and all rights which are transferred or created by the agreement are revested or discharged by the avoidance. If, when it is avoided, nothing has occurred to alter the position

(*a*) *Load v. Green*, 15 M. & W. 220; *Rawlins v. Wickham*, 3 D. & J. 322; *Pentelow's Case*, 4 Ch. 178; *Clough v. London & North-Western Railway Co.*, L. R. 7 Exch. 31;

Lindsey Petroleum Co. v. Hurd, ib. 5 P. C. 221.

(*b*) 3 App. Ca. 1278, *per* Lord Blackburn.

of affairs, the rights and remedies of the parties are the same, as if it had been void from the beginning; but if any alteration has taken place, their rights and remedies are subject to the effect of that alteration (*c*). There can be no avoidance of an agreement unless the parties can be restored to their original condition. As a condition to rescission, there must be a *restitutio in integrum*. Though the party defrauded may rescind the transaction and demand restitution, he can only do so on the terms that he himself makes restitution. If, either from his own act, or from misfortune, it is impossible to make such restitution, it is too late to rescind (*d*). A contract cannot be rescinded in part, and stand good for the residue. A man cannot treat the agreement as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it. There cannot be rescission if the circumstances have in the meantime so far changed that the parties cannot be restored to the position in which they stood before or at the time of the contract. There cannot, indeed, be rescission if the position even of the wrongdoer is so affected that he cannot be placed *in statu quo* (*e*). Thus, where a person has been induced by fraud to buy goods on credit, in order to avoid the contract upon the discovery of the fraud, he must return the goods, and if he does not, or cannot do so, he must pay the price, or, at least, show a fraudulent defect in the goods in reduction of the price, in answer to an action for the price. After consuming the goods wholly, or in part, he cannot avoid the contract by which he obtained them, because he can no longer return them (*f*). So, in the case of a bill given for goods sold and delivered, the buyer cannot avoid the bill on the ground of the sale being fraudulent so long as he retains the goods (*g*). So,

(*c*) *Queen v. Sadlers' Co.*, 10 H. L. 420, *per* Lord Blackburn.

(*d*) 5 App. Ca. 338, *per* Lord Blackburn.

(*e*) *Clarke v. Dickson*, El. Bl. & El. 148; *Clough v. London & North Western Railway Co.*, L. R. 7 Q. B. 34; *Erlanger v. New Sombrero Phos-*

phate Co., 3 App. Ca. 1268; *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 338, *per* Lord Blackburn.

(*f*) *Clarke v. Dickson*, El. Bl. & El. 148. See *Harnor v. Groves*, 15 C. B. 667.

(*g*) *Sully v. Freeman*, 10 Exch. 535.

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also, a resale of goods by the vendee, though without notice of the fraud, is an absolute bar to rescission of the original contract of sale. The rule is not subject to an exception where the act which rendered restitution impossible has been induced by the same fraud as had procured the original contract; nor is the right of rescission subject to the condition of restoring the other party to the same condition as before *so far as possible*. This contention is contrary to the principle upon which all cases of avoidance of contracts rest. It is of the essence of such an avoidance that no part of the consideration originally passed, or that if it did pass, *the whole consideration* subsequently failed, either by reason of a return, or a tender of all benefit received under the contract by the avoiding party, or for some other cause. So long as part of the consideration is retained, the party is not permitted to allege that his retention is unlawful, and rightful retention involves the continued existence of the contract under which alone the consideration can be rightfully held (*h*). In a case where, on the treaty of a marriage, a promissory note was given in consideration of the marriage, which was afterwards solemnised, and an action was subsequently brought by the indorsee against the two joint and several makers of the note, it was held that as the marriage, the consideration for the note, could not be undone, it was not competent to the defendants to avoid the note on the ground of fraud practised during the marriage treaty (*i*).

The rule that a party cannot repudiate an executed contract on the ground of fraud, unless on the condition of restoring the other party to his original condition, is not affected by the fact that the latter has by his acts rendered such restoration impossible (*k*). Where a party retains any benefit from a contract induced by fraud, ignorance of the fraud at the time such benefit accrued will not enable him to repudiate the contract (*l*).

Upon the same principle, where a man has been induced to take shares in a cost book mining company by fraudulent re-

(*h*) *Hogan v. Healy*, I. R. 11 C. L. 122.

(*i*) *Ib.*

(*k*) *Savage v. Canning*, 16 W. R. 133.

(*l*) *Ib.*

presentations of the directors, and the company was afterwards converted into a registered joint stock company with limited liability, in which he received shares on account of his original shares; it was held that it was no longer open to him, upon a subsequent discovery of the fraud, to avoid his contract, because he could no longer return the shares in the same state in which they were at the time of making the contract (*m*).

In *Western Bank of Scotland v. Addie* (*n*), where a man had been induced, by fraudulent representations of the directors, to take shares in the company, and he claimed to recover the value of his shares, and to be re-imbursed in damages which he had sustained; but after his purchase of shares, and before he instituted the action, the bank, which was an unincorporated company, was, with his concurrence, incorporated and registered under the Joint Stock Companies Act, 1856, for the purpose of being wound up; upon these facts, it was held he had no remedy against the new corporation which had been formed. Lord Cranworth said: "He was a party to a proceeding whereby the company from which the purchase was made was put an end to; it ceased to be an unincorporated, and became an incorporated, company with many statutable incidents connected with it, which did not exist before the incorporation. The new company is now in the course of being wound up. He comes too late; the appellants are not the persons who were guilty of the fraud, and although the incorporated company is by the express provisions of the statute, under which it was incorporated, made liable for the debts and liabilities incurred before the incorporation, I cannot read the statute as transferring to the incorporated company a liability to be sued for frauds or other acts committed by the directors before incorporation."

Nor can there be rescission if third parties, without notice of the fraud, have in the mean time acquired rights and interests in the matter (*o*). Thus, where a man has bought goods by means

(*m*) *Clarke v. Dickson*, El. Bl. & El. 148.

(*n*) 1 Sc. App. 145.

(*o*) *Clough v. London & North Western Railway Co.*, L. R. 7 Exch.

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of a fraud upon the seller, and whilst the contract of sale is still subsisting, sells them to a third party, who takes them *bond fide*, and without notice of the fraud, the latter acquires a good title to the goods, which cannot be defeated by the original seller subsequently disaffirming the contract (*p*). So also where a negotiable instrument is obtained by fraud, the negotiation of the instrument gives a valid title to a transferee who takes it without notice of the fraud (*q*). So also it was held to be no answer to an application by a creditor to issue execution against the shareholder, that the shareholder had been induced to become such by fraud (*r*).

Upon the same principle, a shareholder in a company who has been induced to take shares by the fraud of the company, cannot avoid the contract and have his name removed from the register of shareholders after an order for winding up of the company, or after a resolution for a voluntary winding-up of the company, on account of the intervening rights of the creditors accruing under the order, nor after a petition for winding-up has been presented on which an order is subsequently made (*s*). But if a man brings his action within a reasonable time after the discovery of the fraud, and before any proceedings for winding up the company have been taken, he is entitled to be relieved from his shares on the ground of the fraud, although a decree may not have been actually obtained for the removal of his name from the list of shareholders at the date of the winding-up order (*t*).

Whether up to the time of the commencement of the wind-

(*p*) *White v. Garden*, 10 C. B. 919. See *Kingsford v. Merry*, 11 Exch. 577, 1 H. & N. 503.

(*q*) *Barber v. Richards*, 6 Exch. 63; *May v. Chapman*, 16 M. & W. 355.

(*r*) *Henderson v. Royal British Bank*, 7 E. & B. 356.

(*s*) *Oakes v. Turquand*, 2 E. & I. App. Ca. 325; *Kent v. Frechold Land, &c., Co.*, 3 Ch. 493; *Stone v. City & County Bank*, 3 C. P. D. 282; *Burgess's Case*, 15 Ch. D. 507; but see

Wood's Case, 15 Eq. 243, where it was held that a man who was induced by fraud to take shares in a company, but who repudiated immediately, was entitled to have his name struck off the register, though a winding-up order had been made. The application for shares was conditional, and the condition was not performed.

(*t*) *Ross v. Estates Investment Co.*, 3 Ch. 682; *Reese River Silver Mining Co. v. Smith*, 4 E. & I. App. Ca. 64.

ing-up a contract to take shares can be rescinded on the ground of fraud, depends on the particular circumstances of the case. If the company has become insolvent and has stopped payment, a rescission of the contract to take shares cannot be permitted (u).

Though as a general rule there cannot be rescission of a contract unless the circumstances of the case are such that the contract can be rescinded *in toto*, and that there can be a *restitutio in integrum*, there is an exception to the rule when the subject of the sale is practically worthless, as, for example, a concession from a foreign government that had become forfeited before sale, there being nothing in such a case to return (x).

So, also, is there an exception to the rule where the contract or transaction is severable, or is of such a nature that it can be partially rescinded. If the contract or transaction is severable, inability to rescind it as to part is not fatal to the right to rescind it as to another part (y). The fact, for instance, that a man who has been induced by fraud to purchase shares in a particular company may have sold some of the shares before discovering the fraud, will not deprive him of the right to have the transaction as to the remaining shares rescinded (z). Nor is the inability of a man to rescind a transaction as a whole fatal to his right of rescission, if his inability to do so is attributable to the party against whom he seeks relief. If the latter has entangled and complicated the subject of the transaction in such a manner as to render it impossible that he should be restored, the party defrauded may, on doing whatever it is in his power to do, have the transaction rescinded (a). So, also, it is no objection to the rescission of a transaction for the purchase of shares obtained by fraud that the shares have fallen in value since the date of the transaction (b). Nor is a man, if the property is of a perishable nature, bound to keep it in a state of

(u) *Tennent v. City of Glasgow* R. 740.
Bank, 4 App. Ca. 615.

(z) *Ib.*

(x) *Phosphate Sewage Co. v. Hart-*
mont, 5 Ch. D. 394.

(a) *Mason v. Boret*, 1 Denio.
(Amer.), 69.

(y) *Maturin v. Tredennick*, 12 W.

(b) *Blake v. Mowatt*, 21 Beav. 613.

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preservation until bill filed (c). His only duty is to do nothing with the property after the bill filed; and in cases where damage is likely to occur, and might be prevented, he ought, perhaps, to give intimation to the defendant, leaving him to do what he pleased (d). A party seeking to set aside a sale of shares is not bound to pay calls on them to prevent forfeiture after filing his bill (e). It is not fatal to his right of rescission that some of the shares may have been forfeited for non-payment of calls since bill filed (f).

A sale, however, of several kinds of shares in one transaction cannot be set aside for misrepresentation, if the person seeking relief is unable to restore all the shares he has taken (g).

So, also, there may be rescission when the situation of the parties has been in no substantial way altered, and the Court is satisfied that by the exercise of its equitable powers to impose terms upon the parties, as a condition of rescission, it can do what is practically just, and can restore the party against whom relief is sought to that which shall be a just situation with reference to the rights which he held antecedently to the transaction, though it may not be able to restore the parties precisely to the state they were in before the transaction (h).

The terms on which a transaction will be rescinded vary with the particular circumstances of the case. In some cases deeds have been absolutely rescinded (i) by the Court decreeing them to be delivered up to be cancelled (k); but the usual course of the Court in setting aside a transaction, is to proceed on the maxim that he who seeks equity must do equity (l). Instruments, accordingly, are either set aside on

(c) *Maturin v. Tredennick*, 2 N. R. 514, 4 N. R. 15, 12 W. R. 740.

(d) *Ib.*

(e) *Ib.*

(f) *Ib.*

(g) *Ib.*

(h) *Bellamy v. Sabine*, 2 Ph. 425; *King v. Savery*, 5 H. L. 627; *Clarke v. Dickson*, El. Bl. & El. 148; *Earl Beauchamp v. Winn*, 6 E. & I. App. Ca. 234; *Erlanger v. New Sombreiro*

Phosphate Co., 3 App. Ca. 1278, per Lord Blackburn; *Lindsey Petroleum Co. v. Hurd*, L. R. 5 P. C. 240; *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 338, per Lord Blackburn.

(i) *Bates v. Graves*, 2 Ves. Jr. 287.

(k) See *Jackman v. Mitchell*, 13 Ves. 586.

(l) *Wilkinson v. Fowkes*, 9 Ha. 594.

repayment of the actual consideration with interest thereon at a reasonable rate (*m*), or are directed to stand as a security for the monies actually advanced, with interest thereon at a reasonable rate (*n*), or for what upon investigation shall be ascertained to be really due (*o*). If the property is personal, a decree for the repayment of monies, or the delivery up and cancellation of the instrument, will be complete relief, although the legal interest should have been conveyed (*p*). But if the subject-matter of the transaction be real estate, it is usual to direct a reconveyance, because if this is not done, a question may arise as to what has become of the real estate (*q*). If, however, the deed is not merely voidable, but wholly void, no reconveyance is necessary (*r*).

Reconveyance ordered when subject-matter is real estate.

The terms on which a reconveyance will be ordered are the repayment of the purchase monies and all sums laid out in improvements and repairs of a permanent and substantial nature, by which the present value is improved, with interest thereon from the times when they were actually disbursed. On the other hand, charges for the deterioration of the property must be set off against the allowances for permanent improvements. The party in possession must also account for all rents received by him and for all profits, such as monies arising from the sale

Terms of reconveyance.

(*m*) *Barnadiston v. Lingood*, 2 Atk. 133; *Lawley v. Hooper*, 3 Atk. 278; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Lowell v. Hicks*, 2 Y. & C. 55; *Wilson v. Short*, 6 Ha. 384; *Ingram v. Thorp*, 7 Ha. 67.

(*n*) *Croze v. Ballard*, 3 Bro. C. C. 120; *Newman v. Payne*, 2 Ves. Jr. 199; *Byne v. Virian*, 5 Ves. 604; *Davis v. Duke of Marlborough*, 2 Sw. 166; *Peacock v. Evans*, 16 Ves. 512; *Colclough v. Bolger*, 4 Dow. 64; *King v. Hamlet*, 2 M. & K. 456, 3 Cl. & Fin. 218; *Earl of Aldborough v. Trye*, 7 Cl. & Fin. 436, 462; *Carter v. Palmer*, 8 Cl. & Fin. 657, 11 Bligh, 397; *Billage v. Southce*, 9 Ha. 540; *Baker v. Bradley*, 7 D. M. & G. 597; *Croft v. Graham*, 2 D. J. & S.

155; *Tyler v. Yates*, 6 Ch. 665; *Lord Aylesford v. Morris*, 8 Ch. 484.

(*o*) *Wharton v. May*, 5 Ves. 27; *Purcell v. Macnamara*, 14 Ves. 91; *Watt v. Grove*, 2 Sch. & Lef. 492; *Longmate v. Ledyer*, 2 Giff. 157.

(*p*) See 1 Ves. 376; *Williamson v. Gihon*, 2 Sch. & Lef. 357; *Eastbrook v. Scott*, 3 Ves. 455; *Cooper v. Joel*, 1 D. F. & J. 240; *Slim v. Croucher*, ib. 520.

(*q*) *Pickett v. Loggon*, 14 Ves. 231; *Clark v. Malpas*, 4 D. F. & J. 401; *Lindsey Petroleum Co. v. Hurd*, L. R. 5 P. C. 242; but see *Hoghton v. Hoghton*, 15 Beav. 278; *Att.-Gen. v. Magdalen College*, 18 Beav. 255.

(*r*) *Ogilvie v. Jeaffreson*, 2 Giff. 381.

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of timber, or from working mines, with interest thereon, from the times of the receipt thereof. He must also pay an occupation rent for such part of the estate as may have been in his actual possession (*s*). Allowance for lasting improvements can only be for such as were made during the period of accounting for the rents (*t*). The account of rents and profits on the one side, and of lasting improvements on the other, must be carried back to the same time (*u*). The decree is erroneous if it directs the account of rents and profits to begin at one time, and the account of lasting improvements at another, unless there is some special reason for doing so (*x*). The party in possession would also, it is conceived, be required to reinstate premises which he had materially altered; *e. g.* a private residence into a shop (*y*).

The value of permanent and substantial improvements of all kinds, by which the present value of the property is improved, such as for the erection of a mansion house, and for plantations of shrubs, will be allowed (*z*). But no allowance will be made for monies which have been expended by the party in possession, as a matter of taste or personal enjoyment (*a*). Nor will

(*s*) *Savage v. Taylor*, Forrest, 234; *Att.-Gen. v. Balliol College*, 9 Mod. 412; *York Buildings Co. v. M'Kenzie*, 3 Pat. Sc. App. Ca. 398, 579, 3 Ross. L. C. Sc. 305; *Ward v. Hartpole*, cit. 3 Bligh, 470; *Ex parte Hughes*, 6 Ves. 617; *Ex parte Bennett*, 10 Ves. 381; *Murray v. Palmer*, 2 Sch. & Lef. 490; *Edwards v. McCloy*, Coop. 308, 2 Sw. 287; *Donovan v. Fricker*, Jac. 165; *Trevelyan v. Charter*, 4 L. J. Ch. N. S. 214; *Trevelyan v. White*, 1 Beav. 588; *Mulhollen v. Marum*, 3 Dr. & War. 337; *Gibson v. D'Este*, 2 Y. & C. C. C. 581; *Mill v. Hill*, 3 H. L. 828; *Dacey v. Durrant*, 1 D. & J. 554; *Tyrrill v. Bank of London*, 10 H. L. 26; *Shannon v. Biddulph*, 13 W. R. 576, 5 N. R. 506; *Dally v. Wingham*, 3 Beav. 162.

(*t*) *Att.-Gen. v. Earl of Craven*, 21 Beav. 411.

(*u*) *Nesom v. Clarkson*, 4 Ha. 103.

(*x*) *Ib.* See as to allowance for improvements of charity property, *Att.-Gen. v. Kerr*, 2 Beav. 429; *Att.-Gen. v. Magdalen College*, 18 Beav. 254; *Att.-Gen. v. Dacey*, 19 Beav. 527.

(*y*) *Donovan v. Fricker*, Jac. 165.

(*z*) *York Buildings Co. v. M'Kenzie*, 3 Pat. Sc. App. 398, 579, 3 Ross. L. C. Sc. 305; *Stepney v. Biddulph*, 13 W. R. 576, 5 N. R. 506.

(*a*) *York Buildings Co. v. M'Kenzie*, 3 Pat. Sc. App. 398, 579, 3 Ross. L. C. Sc. 305; *Att.-Gen. v. Kerr*, 2 Beav. 429; *Mill v. Hill*, 3 H. L. 828.

allowance be made for monies which have been expended upon the property with the view of rendering it impossible for the real owner to recover his estate, and so improving him out of it, as it may be called (*b*).

A purchaser who seeks to set aside a transaction on the ground of fraud should specially pray in his statement of claim for the repayment of repairs and improvements. He will be credited with the amount of repairs and improvements, executed before the discovery of the defect in title, if their repayment is specially prayed (*c*); and probably, if necessary, repairs executed during or pending litigation, if specially prayed (*d*).

A purchaser who has a contract for the sale of land set aside on the ground of fraud is entitled to a lien on the land for the purchase money which he has paid (*e*).

In a case where a purchase was set aside for fraud, and the purchaser was decreed to pay an occupation rent, receiving back his purchase monies with interest, there being a considerable excess of the rent over the interest, annual rests were directed, until the principal should be liquidated (*f*); but a special case must be shown to warrant such a direction (*g*).

It is not the course of the Court to direct an account of wilful neglect and default, in cases where the possession is not primarily referable to the character of mortgagee (*h*). When persons, though in fact mortgagees, enter into possession of rents and profits in another character, they cannot be subjected

(*b*) *Kenney v. Brown*, 3 Ridg. 518; *Stepney v. Biddulph*, 5 N. R. 505, 13 W. R. 576, Sug. V. & P. 287. See *Pelly v. Bascombe*, 4 Giff. 390.

(*c*) See *Edwards v. McCleay*, 2 Sw. 289.

(*d*) Sug. V. & P. 279; Dart, V. & P. 439.

(*e*) *Aberaman Iron Works Co. v. Wickens*, 4 Ch. 101.

(*f*) *Donovan v. Fricker*, Jac. 165.

(*g*) See *Neeson v. Clarkson*, 4 Ha. 97;

(*h*) *Murray v. Palmer*, 2 Sch. & Lef. 486; *Tredyan v. Charter*, 4 L. J. Ch. N. S. 214; *Murphy v. O'Shea*, 2 J. & L. 422; *Sherrin v. Shakespeare*, 5 D. M. & G. 531; *Lord Kensington v. Bourerie*, 7 D. M. & G. 134, 156, 157; *Purkinson v. Hanbury*, 2 D. J. & S. 450. See decree in *Gresley v. Mousley*, 4 D. & J. 101; but see decree in *Murray v. Palmer*, 2 Sch. & Lef. 489; *Gibson v. D'Este*, 2 Y. & C. C. C. 581.

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to that special liability (*i*). The rule may be different if a special case of fraud be made out (*j*).

If there has been long delay in bringing the action, the account of rents and profits will be limited to the time of bringing the action (*k*).

Terms of rescission where trustee, agent, &c., has sold property of his own surreptitiously to cestui que trust, principal, &c. ;

If the transaction complained of is one in which a trustee or agent, employed to purchase, has sold property of his own surreptitiously, to his *cestui que trust* or principal, the right of the latter is not merely to rescind the contract *in toto*, or to abide by it in its integrity, but to hold the property, and to pay no more for it than the trustee or agent himself had paid (*l*). If the agent sells to his principal property of his own for which he has paid nothing, the principal can only retain the property upon the terms of paying its proper value (*m*).

If a company make out a case for rescission of a contract on the ground of fraudulent representation and concealment by the promoters or directors, the terms of rescission are that the promoters or directors repay the whole of the purchase monies with interest at 4 per cent., and all monies in the nature of a bribe which they have received for neglecting their duty, and all profits which they have unduly made, the company on the other hand to account for any profit they may have made (*n*).

If a company which has been brought into existence by promoters do not seek to rescind the contract under which the company has been formed, but elect to recover from the promoters a sum of money as due to them for profits unfairly made, the promoters will be allowed all expenses properly incurred in bringing out the company, but they are not entitled to a commission (*o*); and in estimating the amount of profits which

(*i*) *Parkinson v. Hanbury*, 2 E. & I. App. Ca. 1.

(*j*) *Howell v. Howell*, 2 M. & C. 478; *Adams v. Sworder*, 2 D. J. & S. 44; *Parkinson v. Hanbury*, 2 E. & I. App. Ca. 15.

(*k*) *Pickett v. Luggon*, 14 Ves. 231; *Mulhollen v. Marum*, 3 Dr. & War. 317.

(*l*) *Bank of London v. Tyrrell*, 10

H. L. 26; *Kimber v. Barber*, 8 Ch. 57.

(*m*) *Great Luxembourg Railway Co. v. Magnay*, 25 Beav. 595.

(*n*) *New Sombbrero Phosphate Co. v. Erlanger*, 5 Ch. D. 125; *Phosphate Sewage Co. v. Hartmont*, ib. 456.

(*o*) *Bagnal v. Carlton*, 6 Ch. D. 389; *Emma Silver Mining Co. v. Lewis*, 4 C. P. D. 407.

a promoter is liable to refund, he will be allowed all sums *bond fide* expended in securing the services of directors, and providing their qualifications, and in payments to the brokers and officers of the company, and to the public press in relation to the company (*p*).

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If the trustee, or other person, filling a fiduciary character, has purchased surreptitiously from the person towards whom he stands in such relation, and the latter does not wish for a reconveyance of the property, the former will be held strictly to his bargain, if it be beneficial to the estate. If it be not beneficial to the estate, the property will be ordered to be resold and reconveyed to another purchaser, if a better can be found; otherwise, he will be held to his purchase; if a better purchaser be found, he will be regarded as a trustee for the profit on the resale (*q*), and will be held responsible for any loss which his interference with the sale may have occasioned (*r*). In a case where an estate sold under a decree of the Court was purchased by a solicitor in the cause without leave of the Court, the Court, after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which he had purchased it; and, if there should be no higher price, that he should be held to his purchase (*s*). In *Williamson v. Seaber* (*t*), where permanent improvements had been made, the estate was put up at its improved value, subject to the question whether he should be allowed the value of such improvements. But the usual course is to order that the expense of repairs and improvements, not only substantial and lasting, but such as have a tendency to bring the estate to a better sale, after making an allowance for acts that deteriorate the value of the estate, shall be added to the purchase-mones, and that the estate shall be put up at the accumulated sum (*u*).

(*p*) *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 922.

(*q*) *Ex parte Reynolds*, 5 Ves. 707; *Ex parte Hughes*, 6 Ves. 617; *Randall v. Errington*, 10 Ves. 428; *Ex parte Morgan*, 12 Ves. 6; *Ex parte Lewis*, 1 Gl. & Ja. 69.

(*r*) *Ex parte Lewis*, *ib*.

(*s*) *Sidney v. Ranger*, 12 Sim. 118. See *Nelthorpe v. Pennymann*, 14 Ves. 517.

(*t*) 3 Y. & C. 717.

(*u*) *Ex parte Reynolds*, 5 Ves. 707; *Ex parte Lucy*, 6 Ves. 625, 629; *Ex parte Bennett*, 10 Ves. 381.

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In estimating lasting improvements, old buildings which had been pulled down after the purchase shall, if incapable of repair, be valued as old materials: but otherwise, as buildings standing (*x*). If the trustee, or other person filling a fiduciary character, who has purchased property surreptitiously from the person towards whom he stands in such relation, has resold the property at a profit, he must account for such profit with interest (*y*).

In a case where a servant took an agreement for a lease of premises in his own name, but really as the agent of his master, and having afterwards denied the agency, claimed to hold the premises for his own benefit, he was decreed by the Court to be a trustee for his master (*z*).

Costs, charges,
and expenses
allowed to com-
plaining party.

Where a transaction is set aside on the ground of fraud, the party complaining will be allowed all costs, charges, and expenses properly incurred in respect of and incident to the transaction, including the costs of conveyance (*a*).

Interest allowed
and debited on
monies.

In taking the accounts between the parties, interest at the rate of 4*l.* per cent. per annum will be allowed on all monies expended in lasting and substantial improvements by the party in possession. The same rate of interest will, as a general rule, be debited to him in respect of monies, &c., &c., received by him, and of costs, charges, and expenses properly incurred by the complaining party (*b*). If, however, there has been a breach of duty, and violation of trust, he will be debited with interest on

(*x*) *Robinson v. Ridley*, 6 Madd. 2.

(*y*) *For v. Macreth*, 2 Bro. C. C. 400; *Hall v. Hallett*, 1 Cox, 134; *Ex parte Reynolds*, 5 Ves. 707; *Brookman v. Rothschild*, 3 Sim. 153; *Rothschild v. Brookman*, 2 Dow. & Cl. 188. See *Bank of London v. Tyrrell*, 10 H. L. 26.

(*z*) *Earl of Stamford v. Dawson*, 15 W. R. 896.

(*a*) *Edwards v. McCleay*, 2 Sw. 289; *Berry v. Armistead*, 2 Keen, 221; *Mulhollen v. Marum*, 3 Dr. & War. 317; *Gibson v. D'Este*, 2 Y. & C. C. C. 581; *Slim v. Croucher*, 1 D.

F. & J. 520; *Haygarth v. Wearing*, 12 Eq. 326.

(*b*) *Gibson v. D'Este*, 2 Y. & C. C. C. 581; *Sharp v. Leach*, 31 Beav. 503; *Maturin v. Tredennick*, 12 W. R. 740. See *Lovell v. Hicks*, 2 Y. & C. 55; 5*l.* per cent was formerly allowed, see Jac. 166, 179. See also *Edwards v. Browne*, 2 Coll. 107; *Att.-Gen. v. Alford*, 4 D. M. & G. 843; *Mayor, &c., of Bernick v. Murray*, 7 D. M. & G. 513, and is sometimes even now allowed; *Stepney v. Biddulph*, 13 W. R. 576.

monies received, or profits made by him, at the rate of 5*l.* per cent. (*c*). If there has been negligence on the part of the complaining party, interest will not be allowed (*d*). Chap. VII.
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In ordinary cases, when the Court sets aside a transaction, the defendant has a right to insist upon an account before he is called upon to reconvey (*e*); but a defendant who is in possession under a pretended purchase cannot, if the Court shall be of opinion that there has been in fact no purchase, insist upon an account of monies paid by, or owing to him, which he alleged, but failed to prove, was the consideration agreed upon for such purchase (*f*). If a reconveyance is ordered, and an account of rents and payment of the balance is ordered, but no lien for such balance is given on the estate, the conveyance must be made at once, without waiting for the result of the accounts (*g*). No reconveyance until account be taken.

In one case the purchaser, obtaining a decree for rescinding a contract, on the ground of fraud, was allowed to follow the stock in which part of the purchase money had been invested (*h*). Purchaser allowed to follow purchase money.

If the transaction into which a man has been induced by fraud to enter is a partnership, the terms of rescission will be that his partner or copartners repay him whatever he may have paid, with interest thereon, and indemnify him against all claims and demands which he may have become subject to by reason of his having entered into the partnership; he, on the other hand, accounting for what he may have received since his entry into the concern (*i*). He is also entitled in respect of the purchase money which he has brought into the partnership to a lien on the surplus of the partnership assets, after satisfy- Terms of rescission of partnership transactions.

(*c*) *Benson v. Heathorn*, 1 Y. & C. C. C. 340; *Mayor, &c., of Berwick v. Murray*, 7 D. M. & G. 518; *Bank of London v. Tyrrell*, 10 H. L. 63; *Imperial Mercantile Association v. Coleman*, 6 E. & I. App. Ca. 209; but see *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 922, where 4 per cent. only was debited.

(*d*) *McCulloch v. Gregory*, 1 K. & J. 286.

(*e*) *Murray v. Palmer*, 2 Sch. & Lef. 490; *Gibson v. D'Este*, 2 Y. & C. C. C. 581; *Wilkinson v. Fowkes*, 9 Ha. 594.

(*f*) *Wilkinson v. Fowkes*, ib.

(*g*) *Trevelyan v. Charter*, 9 Beav. 140.

(*h*) *Small v. Attwood*, Younge, 507.

(*i*) Lindl. on Part. p. 927.

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ing the partnership debts and liabilities, and in respect of any sums which he has paid or might pay in satisfaction of partnership debts, he is entitled to stand in the place of the partnership creditors to whom he made the payment (*k*).

Terms of rescission where a man has been induced by fraud to take shares in a company.

If a man has been induced by false representations in the prospectus of a company to take shares from the company, he is entitled to recover his money, and to have his name removed from the register (*l*). If he has received dividends before discovering the fraud, the terms of rescission are that his name shall be removed from the register, and that an account shall be taken of what sums have been paid to him by the company, and of what sums he has received with interest at a reasonable rate, and that the balance shall be paid to him with all costs (*m*).

Removal of fictitious name from register.

Where a person in order to defraud his creditors has transferred stock to a fictitious person, upon proof of the fact, it will be ordered that the fictitious name shall be erased from the register, and that the name of the real owner be inserted (*n*).

Removal of name of transferee when there is fraud in the company.

When the directors of a company have power to decline to register any transfer of shares, if they do not approve of the transferee, and have registered a transfer of shares which they had reason to believe was a *bonâ fide* instrument, the Court will, after a winding-up order has been made, expunge from the list of shareholders the name of the transferee and substitute in his place the name of the shareholder, if it be shown that the transferee was a man of straw, and that the deed of transfer had been executed in collusion between him and the shareholder, so as to enable the latter to escape from his liability to the creditors of the company (*o*). So, also, when a director of a company, making an improper use of his position, had transferred his shares to his clerk, under circumstances

(*k*) *Mycock v. Beatson*, 13 Ch. D. 384.

(*l*) *Blake's Case*, 34 Beav. 639; *Ross v. Estates Investment Co.*, 3 Eq. 122; *For's Case*, 37 L. J. Ch. 257; *Chester v. Spargo*, 16 W. R. 576.

(*m*) *Kent v. Freehold Land and*

Brickmaking Co., 4 Eq. 598.

(*n*) *Green v. Bank of England*, 3 Y. & C. 722; *Arthur v. Midland Railway Co.*, 3 K. & J. 204.

(*o*) *Payne's Case*, 9 Eq. 224; *Kintred's Case*, 5 Ch. 95; *Snow's Case*, 19 W. R. 1057.

which showed that he did so to escape his liability, and the transfer was registered, the name of the transferee was removed from the list of shareholders, and that of the director was substituted (*p*). So, also, where a shareholder in a company in which the approval of the directors is necessary to the transfer of shares pays a person to accept a transfer of his shares, and the company is afterwards wound up, his name will be placed on the list of contributories instead of his transferee, unless he can show that the consideration expressed to be paid to the transferee was in fact received by him for his own benefit, and that the directors were in fact informed of everything which was material for their decision when they approved the transfer (*q*). So, also, when there is transfer of shares, the name of the transferee will be struck out from the register, and that of the transferor substituted in its stead, if it appear, not only that the transfer was made to get rid of liability, but that it was a sham and not a real transaction, and was not intended to divest the interest of the transferor and to render the transferee the real owner of the shares, but the transferee held them subject to the order of the transferor (*r*).

If a man's name has been placed on the register of shareholders of a company without his consent, through the false representations of a third party, and an order to wind up the company has been subsequently made, the Court will order it to be removed from the register (*s*).

There can be no rescission of a contract or other transaction, if it appear that the defrauded party has at any time after knowledge of the fraud, either by express words or unequivocal acts, elected to affirm the contract. If after discovering the fraud he has in any manner elected to affirm the contract, his right to rescind is waived. He cannot revoke his election, and avail himself of the fraud in avoidance of the contract, according to the general maxim as to election *quod semel placuit in*

(*p*) *Gilbert's Case*, 5 Ch. 560.

(*q*) *Re European Association Arbitration, Philipp's Case*, 18 Sol. J. 380. See *Hodge's Case*, ib. 708.

(*r*) *King's Case*, 6 Ch. 196; *Re*

Humber Iron Works, &c., Co., 45 L. J. Ch. 48.

(*s*) *Re Patent File Co., Ex parte White*, 15 W. R. 754. See *Wood's Case*, 15 Eq. 240.

Removal of name inserted by fraud on register.

Waiver of right to rescind.

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electionibus amplius displicere non potest (t). Thus, where a man after knowledge of the fraud continues to deal with the property as his own, he thereby affirms the contract (*u*). So, also, the taking steps to enforce a contract is a conclusive election not to rescind on account of anything known at the time (*x*). So a man who had been induced by fraudulent misrepresentations to take a lease of a mine, having continued to work the mine after full discovery of all the circumstances of fraud, was held to have lost thereby his claim to be relieved from the lease (*y*). But in a case where the insurance of a ship had been obtained by the non-disclosure of material information respecting it, entitling the underwriter to an election to avoid the insurance, it was held that the merely formal act of delivering out the stamped policy, in conformity with the slip or memorandum previously signed, was not such an act as of itself determined the election (*z*).

Upon the same principle, when a man has been induced to take shares in a company by misrepresentation contained in the prospectus, and after discovering the true state of the facts, exercises acts of ownership over the shares inconsistent with the repudiation of them, as by contracting to sell them, he can no longer have the contract set aside and his name removed from the register of shareholders (*a*). So, also, the same principle applies where a man, after notice of the fraud, accepts dividends upon the shares (*b*); or does any act in affirmance of his position as shareholder (*c*).

If the party defrauded, having once discovered his right to avoid the contract as fraudulent, elects to affirm it, his right to avoid it is not revived by the subsequent discovery of additional incidents of fraud by which it was obtained, the effect of such

(*t*) Co. Litt. 146; Com. Dig. 562.

Election, C. 2; *Clough v. London & North Western Railway Co.*, L. R. 7 Exch. 35.

(*u*) *Campbell v. Fleming*, 1 A. & E. 40.

(*x*) *Gray v. Fowler*, L. R. 8 Exch. 280, *per* Lord Blackburn.

(*y*) *Vigers v. Pike*, 8 Cl. & Fin.

(*z*) *Morrison v. Universal Marine Insurance Association*, L. R. 8 Exch. 197.

(*a*) *Ex parte Briggs*, 1 Eq. 483.

(*b*) *Sheffield's Case*, John. 451;

Clarke v. Dickson, El. Bl. & El. 148.

(*c*) *Sharpley v. Louth Railway Co.*, 2 Ch. D. 663, *supra*, p. 334.

discovery being only to strengthen the evidence of the fraud and not to affect the right of repudiation which had been waived (*d*). But the repudiation of a contract may be supported by any grounds of fraud subsequently discovered (*e*).

Mere delay in determining his election may in some cases preclude the party defrauded from avoiding the contract, and so operate in affirmance of it. Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and when the lapse of time is great, it probably would in practice be treated as conclusive evidence that he has so determined (*f*). Thus when a contract for insurance is voidable for concealment, if the insurer by delaying his election to rescind were to prevent the insured from insuring elsewhere, he would be precluded from afterwards avoiding the insurance (*g*).

The party defrauded may, instead of rescinding his contract, stand to the bargain even after discovery of the fraud, and recover damages for the fraud, or he may recoup in damages if sued by the vendor for the price. The affirmance of the contract by the vendee after discovery of the fraud merely extinguishes his right to rescind. His other remedies remain unimpaired (*h*). The party defrauded may elect to affirm the contract for the purpose of obtaining the remedy upon it in damages, although the fraud renders the performance impossible, and the other party cannot allege his own fraud by way of defence; thus, when a woman was induced to enter into a promise to marry a man by his concealing the fact that he was already married, it was held that she might affirm the contract by remaining unmarried for the purpose of claiming damages for the breach, and that he could not set up the marriage which he had fraudulently concealed in

Right of party
defrauded to
affirm contract
and recover
damages.

(*d*) *Cumppell v. Fleming*, 1 A. & E. 40.

(*e*) *Wright's Case*, 7 Ch. 55.

(*f*) *Clough v. London & North Western Railway Co.*, L. R. 7 Exch. 35; per Cur. *Morrison v. Universal Marine Insurance Co.*, ib., 8 Exch. 204, *supra*, p. 339.

(*g*) *Morrison v. Universal Marine*

Insurance Co., L. R. 8. Exch. 204.

(*h*) *Wild v. Harris*, 7 C. B. 999; *Millward v. Littlewood*, 5 Exch. 775; *Clarke v. Dickson*, El. Bl. & El. 148; *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 323, per Lord Cairns. See *Dobie v. Duncanson*, 10, Dec. of Court of Session, 4th series, 810.

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order to discharge him from his promise (*i*). Though a person purchasing a chattel or goods concerning which the vendor makes a fraudulent misrepresentation, may, on finding out the fraud, elect to retain the chattel or goods, and still have his action to recover any damages he has sustained, the same principle does not apply to shares or stock in a joint-stock company, for a person induced by the fraud of the agents of a joint-stock company to become a partner in that company can bring no action against the company whilst he remains in it: his only remedy is *restitutio in integrum* and rescission of the contract; and if that becomes impossible by the winding up of the company or by any other means, his action for damages cannot be maintained (*k*).

Mode of exercise
of right of elec-
tion to rescind.

If a party elects to rescind, he must manifest that election by communicating to the other party his intention to rescind the transaction and claim no interest under it. The communication need not be formal, provided it is a distinct and positive repudiation of the transaction. The true question in determining whether there has been rescission is whether the acts and conduct of the party evince an intention to rescind (*l*). If a buyer of goods has been imposed on by the vendor, he may refuse to accept the goods, if he discover the fraud before delivery or return them, if the discovery be not made till after delivery: and if he has paid the price, he may recover it back on offering to return the goods in the same state in which he received them (*m*). If the party defrauded has executed a conveyance, he may, on returning or offering to return the consideration or whatever property he may have received in exchange for that which he has conveyed, recover back what he has conveyed. If the subject-matter of the contract be land, and there has been a conveyance to him, he should tender a reconveyance. After the tender of the property, or a reconveyance if it be land, on refusal by the vendor to receive the same, the expense of keeping

(*i*) *Wild v. Harris*, 7 C. B. 999;
Millward v. Littlewood, 5 Exch. 775.

(*k*) *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 317.

(*l*) *Mersey, &c., Steel Co. v. Naylor*,
9 Q. B. D. 666.

(*m*) *Clarke v. Dickson*, El. Bl. &
El. 148.

the property from the time of the tender may be recovered (*n*). It is a sufficient repudiation of a contract to take shares in a company if a man brings an action to have his name removed from the list of shareholders, or takes proceedings under sect. 35 of the Companies Act, 1862, before a petition for winding up has been presented (*o*), or promptly requires the directors to remove his name from the register, though he does not take proceedings under sect. 35 of the Companies Act, 1862 (*p*), or if he has refused to pay the allotment money, and has stated to the secretary and openly at a public meeting of the company that he repudiates the shares, though he has taken no steps to have his name taken off the list of shareholders and no action has been brought against him for the allotment money (*q*). But it seems that if, notwithstanding an express repudiation, the other party persists in treating the contract as in force, judicial steps should be taken in order to make the rescission complete as against rights of third persons which may subsequently intervene (*r*). When the original contract was made with an agent for the other party, communication of the rescission to that agent is sufficient, at all events before the principal is disclosed (*s*).

It remains open to the party defrauded to rescind the contract by way of defence to any action or legal proceeding brought upon it. The plea of fraud would be a sufficient determination of election to avoid the contract, although there was no declaration of intent to rescind before the time of pleading (*t*). The plea at common law is in the general form that the defendant was induced to make the contract by the fraud of the plaintiff without further alleging the avoidance. But the plea imports an avoidance of the contract, and it is necessary to prove some act of avoidance in support of the plea, as the return of the goods sold or the like, when the circumstances of the case require it (*u*).

(*n*) *Cuswell v. Coare*, 1 Taunt. 566.
See *Dalby v. Pullen*, 1 R. & M.
296.

(*o*) *Ross v. Estates Investment Co.*,
3 Ch. 682; *Persse's Case*, 1 R. 6 Eq.
298.

(*p*) *Ex parte Shields*, 1 R. 7 Eq.
264; *Wood's Case*, 15 Eq. 243.

(*q*) *McNeill's Case*, 10 Eq. 503.

(*r*) *Kent v. Frechold, &c., Land
Society*, 3 Ch. 493.

(*s*) *Maynard v. Eaton*, 9 Ch. 414.

(*t*) *Morrison v. Universal Marine
Insurance Co.*, 1 R. 8 Exch. 204.

(*u*) *Dowes v. Harness*, 1 R. 10 C.
P. 166. When a defendant to an

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Where the effect of the contract is to place the party in a position or invest him with property to which liabilities are attached, as in the case of an allotment of shares in a company induced by fraud or misrepresentation on the part of the company, the party defrauded, in order to discharge the liability, must not only avoid the contract, but must also disclaim and repudiate the property to which the liability is incident. In an action accordingly against a shareholder in a company for calls, it was held that a plea alleging merely that he was induced to become a shareholder by fraud was insufficient as admitting that he was still a shareholder and subject to the liability, and that it was necessary further to allege that as far as possible he had repudiated the shares (*x*). The effect of repudiating the shares upon the ground of fraudulent allotment is to discharge the liabilities *ab initio*, and a shareholder was held entitled to the full benefit of such discharge, although in ignorance of the fraud he had accepted a cancellation of the shares at a later date upon other grounds (*y*).

Parties privy to
the fraud affected
by rescission.

Parties who are implicated in the fraud, or who take with notice of the fraud, acquire no rights against the party defrauded, and their rights acquired through the contract are voidable together with the contract upon which they depend. Thus where goods bought under a fraudulent sale were consigned to a third party who assisted in the fraud, and who sought to recover them from the carrier through whom they had been consigned, it was held that the avoidance of the contract by the seller was an answer to his claim, and even after he had commenced an action against the carrier (*z*).

Rescission when
contract is
induced by fraud
of agent.

There may be rescission, if the fraud inducing the contract was that of an agent acting in the business of his principal and within the scope of his authority, though the principal was ignorant of the fraud and free from all moral guilt, or even,

action pleads fraud, the Court will require him to bring into Court any money which the plaintiff has paid to him. *Clough v. London & North Western Railway Co.*, L. R. 7 Exch. 26.

(*x*) *Deposit & General Life Assu-*

rance Association v. Ayscough, 6 E. & B. 761 ; *Bulch y Plwn Mining Co. v. Baynes*, L. R. 2 Exch. 324.

(*y*) *Wright's Case*, 7 Ch. 55.

(*z*) *Clough v. London & North Western Railway Co.*, L. R. 7 Exch. 26.

being a corporation, was necessarily incapable of knowing anything except by its agents, and, therefore, free from all moral guilt, if such a phrase can be properly applied to a corporation (*a*).

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After a conveyance has been executed, the Court will set aside a transaction only on the ground of actual fraud. Mere constructive notice is not sufficient (*b*).

Rescission after
conveyance
executed.

Where accounts are impeached, the Court will order them to be opened, though extending over a long period of years, if they contain a single fraudulent entry, and will not merely give liberty to surcharge and falsify (*c*).

Opening
accounts.

In the case of the bankruptcy of the fraudulent buyer, the seller may avoid the sale and claim back the goods against the trustee in bankruptcy, because the trustee takes only the right and interest of the bankrupt; nor can the trustee claim to retain the goods as having been in the possession of the bankrupt with the consent of the true owner, for the seller never consented to any other possession in the bankrupt than in the right of buyer, and the seller does not resume the position of real owner until disaffirmance of the sale (*d*).

Rescission by
seller in case of
bankruptcy of
fraudulent
buyer.

It has been said that any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud in equity, and entitles the last-named principal to have the contract rescinded and to refuse altogether to proceed with it (*e*). But Lord Justice Mellish was not willing to go so far. The consequence of fraud in his opinion was that the Court would see that the defrauded party obtained full redress for the fraud, as far as that could be given. If it could be obtained *with* the contract it should be so given; if not, it must be given *without* the contract, and rescission must be allowed. It was his opinion that the situation of the contract in question was one of the latter kind. The only way in which the injured party could be

Rescission when
there is surrep-
titious dealing
between one
principal and
the agent of the
other principal
to a contract.

(*a*) *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 338, *per* Lord Blackburn.

D. 150.

(*b*) *Wilde v. Gibbon*, 1 H. L. 624.

(*d*) *Load v. Green*, 15 M. & W. 216. See *Re Reed*, 3 Ch. D. 123.

(*c*) *Gething v. Keighley*, 9 Ch. D. 550. See *Watson v. Rodwell*, 11 Ch.

(*e*) *Panama Telegraph Co. v. India Rubber Co.*, 10 Ch. 515, *per* James, L. J.

suitably relieved was by rescission. The case was this :—A telegraph works company had agreed with a telegraph cable company to lay a cable, the same to be paid for by a sum payable when the cable was begun, and by twelve instalments payable on certificates by the cable company's engineer, named in the contract. Shortly afterwards the engineer, who was engaged to lay other cables for the works company, agreed with them to lay this cable also for a sum of money to be paid to him by instalments payable by the works company when they received the instalments from the cable company. It was held that, under the circumstances, the agreement between the engineer and the works company was a fraud, entitling the cable company to have their contract rescinded, with a return of the money which they had paid under it (*f*).

In the course of his judgment Lord Justice Mellish said as follows :—“ I am not quite certain that I go the full length to which the Lord Justice has gone in thinking that, because a person has been party to a fraudulent act of this kind after the contract was made, the mere fact of his having been guilty of such fraudulent conduct, supposing that a full remedy for the fraud could be otherwise obtained, would entitle the other to say, ‘ Because you acted fraudulently, therefore I will have nothing more to do with you, and I will not carry out my contract with you.’ I am not aware of any authority which has gone to that extent. As far as I know, the consequence of fraud is that the Court will see that the party defrauded obtains, as far as can be given, full redress for the fraud ; and I have thought it, therefore, necessary in this part of the case to consider whether the plaintiffs could be relieved from the consequences of this fraud by anything short of the relief which the Vice-Chancellor has given them. Now I do not think it necessary to give a conclusive opinion whether at law there would be a defence on the ground that by the act of the defendants the performance of the contract has been rendered impossible. No doubt it is a clear principle of law that if by any act of one of the parties the performance of a contract is rendered impossible, then the other side may, if they choose, rescind the contract, and cer-

tainly, according to the case of *Planché v. Colburn* (g) and other cases it appears sufficient if the contract cannot be performed in some other manner not very different. Still there may be a question of law in a case of this kind as to how far the certificate of the engineer would be considered so much of the essence of the contract that the plaintiffs having been deprived of that would be entitled at law to rescind the contract. But, whether it is so or not, I am clearly of opinion that if by any fraudulent misconduct of the defendants in entering into an agreement with the engineer, which had the effect of making it impossible to keep him as a disinterested engineer, if by that act it is rendered impossible that the plaintiffs can have the full benefit of the contract, then it appears to me that there is sufficient to entitle them to rescind the contract. Now the way in which the question arises in the present case is really this. The contract has been broken, and it seems to be clear on the facts that, independently of the question which is raised before us, it has been broken by the plaintiffs, and so long a time has elapsed that neither party is bound to the other to complete the contract. The only question, then, is whether the defendants ought to keep the £40,000 paid them by the plaintiffs under the contract, and, besides that, ought to be allowed to sue at law for any damages they may have sustained, on the ground of the plaintiffs not having completed the contract. .

. . . It seems to me that it would be in the highest degree inequitable to allow the defendants to keep the £40,000. The contract having been broken and having come to an end, is it to be treated as having been broken by the default of the plaintiffs or by the default of the defendants? It appears to me clearly that the defendants have deprived the plaintiffs of the advice of their engineer, and having by improper conduct deprived them of his advice, the contract clearly must be treated as having been broken off through the default of the defendants, and having been broken off through their default and misconduct, it follows that the plaintiffs are entitled to have the £40,000 paid back and that they are entitled to be

(g) 8 Bing. 14.

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Rescission
though a profit
may accrue to a
party to the
fraud.

protected from any action at law to recover damages on account of their having, as alleged, broken the contract."

It is no argument against setting aside a contract that has been obtained by fraud that a profit may be given to a shareholder who is a party to the fraud, a profit because he will take it in respect of his shares, and that, since as between co-conspirators there is no contribution, his brother conspirators who are made liable for the fraud cannot make him repay his contributions (*h*). "The Court," said Jessel, M.R. (*i*), "will not hold its hands and avoid doing justice in favour of the innocent because it cannot apportion the punishment fully amongst the guilty. A dozen parties to a fraud may be defendants and one decree or judgment go against all, and if it is a fraud of such a character that none of them can bring an action for contribution, the plaintiff may, at his will and pleasure, enforce that judgment against any one of them and perhaps pass over the most guilty of them, still there is no remedy as between those who commit the fraud. It is one of the punishments of fraud that there is no such remedy, and that a guilty party, though not the most guilty, may suffer the greatest amount of punishment. It is one of the deterrents to prevent men from committing fraud."

Remedies when
vendee of goods
is insolvent.

If a vendee discover that he is insolvent, and that it is not in his power to pay for the goods, the courts have allowed him to rescind the contract, and return the goods to the seller, with his assent, provided he did so before the contract was consummated by an absolute delivery and acceptance, and provided it was done in good faith, and not with the colourable design of favouring a particular creditor. He cannot rescind the contract after the transit has ceased, and the goods have been actually received in his possession, and the rights of creditors have attached (*j*).

Following goods
obtained from
vendor on mis-
representation
by vendee as to
his solvency.

If goods are obtained from the vendor by means of a fraudulent misrepresentation of the vendee as to his situation and

- (*h*) *New Sombrero Phosphate Co.* 80; *Richardson v. Goss*, 3 B. & P. 119; *Neate v. Ball*, 2 East, 117;
v. Erlanger, 5 Ch. D. 114. *Dixon v. Baldwin*, 5 ib. 175; *Salle*
(*i*) *Ib.* *v. Fiehl*, 5 T. R. 211.
(*j*) *Barnes v. Fredlund*, 6 T. R.

circumstances, the vendor may elect to affirm the sale, and sue for the price, or to avoid the sale and follow the goods, or the proceeds thereof, into the hands of a third person who has received them, without laying any new consideration. But if he proceeds to judgment against the vendee after he is apprised of the fraud, his election is determined, and he cannot afterwards follow the goods into the hands of a third person on the ground of fraud (*k*).

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If a specific chattel be sold under a warranty, and the property has passed to the purchaser, he cannot return the chattel and claim back what he has paid, or resist an action for the price, on the ground of breach of warranty, unless there was a condition to that effect in the contract; but must have recourse to an action for damages in respect of the breach of warranty (*l*). The case, however, is different if fraud can be shown. If a representation be made fraudulently for the purpose of inducing a party to enter into a contract, the party defrauded is entitled to avoid the contract on the ground of fraud, and may recover back the price, notwithstanding the warranty of the same matter (*m*).

Rescission of
chattels sold
under a war-
ranty.

In the case of money paid as the consideration of a contract, the party defrauded may on avoidance of the contract recover the amount as a debt (*n*).

Actions to
recover money.

When a defendant has fraudulently procured the plaintiff to sell goods to a person who cannot pay for them, and the defendant gets the goods into his possession, he cannot set up the sale to him because his own fraud has procured it, and the mere possession unaccounted for raises an *assumpsit* to pay (*o*). So also if under similar circumstances there has been a re-sale of the goods, and the defendant obtains possession of the monies on such re-sale, the plaintiff may in an action for money had

(*k*) *Lloyd v. Brewster*, 4 Paige (Amer.), 537; *Bank of Beloit v. Beale*, 7 Tiff. (Amer.), 475.

(*l*) *Street v. Blay*, 2 B. & Ad. 462; *Dawson v. Collis*, 10 C. B. 523; *Behn v. Burness*, 3 B. & S. 755.

(*m*) *Street v. Blay*, 2 B. & Ad. 462; *Murray v. Mann*, 2 Exch. 538.

(*n*) See *Oakes v. Turquand*, 2 E. & I. App. Ca. 325.

(*o*) *Hill v. Perrot*, 3 Taunt. 274.

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Though rescission cannot be had, action of deceit may be maintained.

Sales by Court set aside on ground of fraud.

Omission to specify contracts as required by sect. 38 of Companies Act, 1867, not a ground for rescission.

Rights of parties on rescission.

and received recover from the defendant the value of the goods unpaid for by the purchaser (*p*).

Although it may no longer be open to the party defrauded, from the change of circumstances which has taken place in the meantime, to avoid the contract or transaction upon discovery of the fraud, he has a remedy by action of deceit for damages against the person by whose misrepresentation he has been misled to his injury (*q*); or if sued on the contract he may recoup in damages or claim a reduction from the contract price to the same extent, if the price is still unpaid.

The rules with respect to sales by the Court are not less stringent than in ordinary cases (*r*). If a sale has taken place under a decree of the Court, and there has been false representation or undue concealment in the conditions or particulars, or a good title cannot be shown, the sale will be set aside if application be made before conveyance executed (*s*). If the conveyance be executed, the purchaser must take the consequences, and can only rely on the covenants (*t*).

A prospectus omitting to specify contracts as required by sect. 38 of the Companies Act, 1867, and not otherwise fraudulent in respect of non-disclosure under the general doctrine of law, gives a remedy to the party taking shares against the promoters, directors, and officers knowingly issuing the prospectus; but it does not affect the contract of the shareholder with the company, nor entitle him to have his name removed from the list of shareholders (*u*).

In cases where the right of rescission is available and has been exercised, the contract is as if void *ab initio*, and the rights of the parties must be determined as if a contract had never existed. The defrauded party is therefore entitled to recover back as upon a total failure of consideration all sums

(*p*) *Abbotts v. Barry*, 2 Bro. & B. 369.

(*q*) *Clarke v. Dickson*, El. Bl. & El. 149; *Western Bank of Scotland v. Addie*, 1 Sc. App. Ca. 167; *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 338, *per* Lord Blackburn.

(*r*) *Lachlan v. Reynolds*, Kay, 55.

(*s*) *Ib.*; *McCulloch v. Gregory*, 1 K. & J. 286; *Else v. Else*, 13 Eq. 196; *Broad v. Muntton*, 12 Ch. D. 131.

(*t*) *Thomas v. Powell*, 2 Cox, 394; *McCulloch v. Gregory*, 1 K. & J. 286.

(*u*) *Gorcer's Case*, 1 Ch. D. 182.

paid by him under the contract, and has a valid defence against an action for recovery of sums which would otherwise be due under the contract (*x*). Anything which in law constitutes a consideration moving to the innocent party, and which actually passes from the contracting party, is a benefit within the rule that benefits received by a person seeking to avoid a fraudulent contract must be restored before avoidance (*y*).

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If the false representation by which a contract has been induced was not made fraudulently, but was made through mistake or misapprehension, and the subject-matter of the contract, though different in some respects and in certain incidents from what it was represented to be, is not so different in substance from what it was represented to be as to amount to a failure of consideration, the transaction will not be set aside, if the party who made the representation is willing to give compensation for the variance (*z*), and the variance is such as to admit of compensation by a pecuniary equivalent (*a*). If, however, the misdescription of the property is such that it cannot be estimated by a pecuniary equivalent, there is no case for compensation, and the transaction will be set aside (*b*).

Compensation
allowed in case
of false repre-
sentation
through mistake.

If the person by whose fraudulent misrepresentation a transaction has been induced, is not himself a party to the transaction, the transaction stands good and cannot be repudiated, if the other party to the transaction has not been party or privy to the fraud (*c*). If, for instance, a man has been induced by the false representations of a third party to deal with another, he cannot have the transaction rescinded, if the other party to the transaction has not been party or privy to the false representation (*d*). So, also, if a man has been induced to take

No rescission if
defrauding party
is not a party to
the transaction.

(*x*) *Hogan v. Healey*, 11 C. L. 122.

(*y*) *Ib.* 125.

(*z*) See *Dyer v. Hargrave*, 10 Ves. 507; *Hill v. Buckley*, 17 Ves. 395; *Martin v. Cotter*, 3 J. & L. 496; *Shackleton v. Sutcliffe*, 1 Deg. & S. 620; *Pulsford v. Richards*, 17 Beav. 96.

(*a*) *Infra*, pp. 419, 420, 421.

(*b*) *Leyland v. Illingworth*, 2 D. F. & J. 248; *Earl of Durham v. Legard*, 34 Beav. 612. See *Howland v. Norris*, 1 Cox, 61.

(*c*) *Pulsford v. Richards*, 17 Beav. 95; *Duranty's Case*, 26 Beav. 270; *Worth's Case*, 4 Drew. 529; *Re Felgate's Case*, 2 D. J. & S. 456.

(*d*) *Pulsford v. Richards*, 17 Beav. 95; *Duranty's Case*, 26 Beav. 271.

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shares from a company by fraudulent misrepresentations made by some person, not by an agent of the company, authorised to make any representations or authorised to deal on behalf of the company, he is bound by his contract with the company, and cannot have it rescinded (*e*). So, also, if a man has been induced to buy shares in a company from a shareholder, on false and fraudulent representations made to him by the seller, the company not being a party or privy to the fraud, he is not entitled to have the transfer set aside as between himself and the company, or to restrain the company from making calls on him, whilst he is a shareholder. His remedy is against his vendor, to compel him to accept a re-transfer of the shares, and for an indemnity for the losses he has sustained in consequence of having taken the shares (*f*).

Cases in which a man has been induced by false representations to purchase shares directly from a company must be distinguished from cases in which the transaction is not with the company, but is between two individuals, meeting in the market and dealing for their private interests, like the seller and purchaser of transferable shares. If a man be induced by false representations on the part of the directors of a company to purchase shares in the company from an actual shareholder who has not been himself a party or privy to the false representations, the shares cannot be forced back on the vendor, because on his part the transaction has been *bonâ fide*, nor can the transaction be set aside as between the purchaser of the shares and the company; for the contract has been between individuals, and the company stands in point of law in the relation of a third party. The purchaser of the shares must seek his remedy in an action against the parties by whose false representations he has been misled (*g*).

Where a man has been induced to enter into a transaction

If defrauding
party is not a

(*e*) *Brockwell's Case*, 4 Drew. 205; 26 Beav. 271, 273; *Worth's Case*, 4 Nicoll's Case, 3 D. & J. 427. Drew. 529.

(*f*) See *Stainbank v. Fernley*, 9 Sim. 556; *Seddon v. Connell*, 10 Sim. 274; *Inglis v. Lumsden*, 21 Dec. of 58, 79; *Maturin v. Tredennick*, 2 N. Court of Session, 2nd series, 200. R. 514, 4 N. R. 15; *Duranty's Case*, See *Worth's Case*, 4 Drew. 529.

by the false and fraudulent representations of a person who is not a party to the transaction, the Court will, when it can do so, make him make good his assertion as far as is possible (*h*). And it can do this in many cases. Where, accordingly, upon a treaty for marriage, a person, to whom the intended husband was indebted, was asked by the father of the lady to make out a list of the debts of the intended husband, and in doing so omitted the debt which was due to himself, on the representation made to him by the intended husband, that, if the debt were disclosed, the marriage would be prevented taking place, he was after the marriage restrained by perpetual injunction from enforcing the debt against the husband (*i*). So, also, where upon a treaty of marriage, a brother, in order to make it appear that his sister had a fortune of 500*l*. whereas she had only 350*l*., gave her a sum of 150*l*., so as to make up 500*l*., and she gave him a bond for the amount, and the marriage took place upon the faith of the representation, it was held that the bond could not be enforced, and it was ordered to be delivered up to be cancelled (*k*). So, also, where a man had made a false representation as to the value of property, which he had agreed to charge as security for another person, his representatives were held bound to make it good (*l*). So, also, where issue in tail told the purchaser of an annuity bequeathed to a younger brother by the father's will that there was a settlement, but that he had not seen it, he was held bound to make the annuity good (*m*). So, also, where a marriage was contracted, and a settlement made on the faith of representations by the executor of a will, under which a certain sum of money was left to the intended husband, that the legacy was substantial

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party to the transaction he will if possible be required to make good his representation.

(*h*) *Pulsford v. Richards*, 17 Beav. 87, 95. See *Arnot v. Biscoe*, 1 Ves. 95; *Burrowes v. Lock*, 10 Ves. 470; *Bushby v. Ellis*, 17 Beav. 229; *Stephens v. Venables*, 31 Beav. 127; *Yeomans v. Williams*, 1 Eq. 185; comp. *Ellis v. Coleman*, 25 Beav. 673.

(*i*) *Nerille v. Wilkinson*, 1 Bro. C. C. 543. See *Dalbiac v. Dalbiac*,

16 Ves. 124; *Vaughall Bridge Co. v. Lord Spencer*, Jac. 67.

(*k*) *Gale v. Lindo*, 1 Vern. 475. See *Montefiori v. Montefiori*, 1 W. Bl. 363.

(*l*) *Ingram v. Thorpe*, 7 Ha. 67. See *Peck v. Gurney*, 6 E. & I. App. Ca. 393.

(*m*) *Hobbs v. Norton*, 1 Vern. 135.

and safe and would be paid at a future time, the estate of the executor was held to have thereby become indebted for the whole amount (*n*). So, also, where a father, previously to the marriage of his daughter, promised to the intended husband to leave her a sum of money, and the promise amounted to a distinct engagement or undertaking, and the marriage took place on the faith of such representation, the Court gave effect to it against the estate of the father (*o*). So, also, the trustee of a fund, who, having received notice of an incumbrance on the fund, had represented to a creditor of the beneficiary that the fund was unincumbered, and that the beneficiary had a right to make an assignment, was held bound to make up the deficiency (*p*). So, also, a solicitor who had made to his client untrue representations respecting a property on which his client was about to advance money, was compelled to make good his representations (*q*). So, also, where a partnership consisting of more than seven members was formed for the purpose of promoting a particular undertaking, and two of the promoters, being members, made a representation that a certain sum of money had been subscribed, and that a certain sum of money would be required for the purpose of carrying out the undertaking, it was held, on an order for winding-up being made, that they must be settled on the list of contributories for all the balance of the unsubscribed capital up to the sum as stated by them that it would cost (*r*). So, also, where A. entered into a partnership with B., the terms being that B. should bring in as capital the business premises and so much more as to make up a certain sum, and the person acting as solicitor for B. in the transaction, who furnished the valuer with particulars, concealed the fact that he had a mortgage over the premises, it was held

(*n*) *Hutton v. Rossiter*, 7 D. M. & G. 9.

(*o*) *Hammersley v. De Biel*, 12 Cl. & Fin. 45; *Barkworth v. Young*, 4 Drew. 1; *Maunsell v. Hedges*, 4 H. L. 1039; *Laver v. Fielder*, 32 Beav. 1; *Alt v. Alt*, 4 Giff. 84. See *Jamieson v. Stein*, 21 Beav. 5; *Kay v. Crook*, 3 Sm. & G. 407; *Prole v.*

Soady, 2 Giff. 1; *Stephens v. Venables*, 31 Beav. 128.

(*p*) *Burroues v. Lock*, 10 Ves. 470; *Slim v. Croucher*, 1 D. F. & J. 518. See *Peck v. Gurney*, 6 E. & I. App. Ca. 390.

(*q*) *Cleland v. Leech*, 5 Ir. Ch. 478.

(*r*) *Moore & De la Torre's Case*, 18 Eq. 661.

on the bankruptcy of B. that the solicitor must make good to A. the amount of the mortgage (*s*).

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If a man either makes or adopts a representation the contrary of which he ought have known, or if he had exercised reasonable care might have known to be the truth, and obtains from the Court on the footing of that representation a wrong order, he is bound to afford to persons injured by the making of that order a complete indemnity of its consequences, including the costs of setting the matter right. Solicitors accordingly are liable for procuring payment of money to the wrong person (*t*).

Though, as a general rule, there can be no rectification when an instrument is founded on fraud (*u*), there may be rectification of a marriage settlement when the Court is satisfied that the settlement has been drawn up and prepared in violation of the agreement and understanding which was come to between the husband and wife before the marriage. When a party acting in the transaction and claiming a benefit under it is proved to have occupied a confidential relation to a lady whom he afterwards marries, and has undertaken to have a proper settlement prepared for her, has an improper settlement made in his own favour, the Court makes the settlement as it ought to have been made, on the principle that the husband undertook to the wife as agent to see that a right settlement was made, and that he is bound by such undertaking (*x*). In *Clarke v. Girdwood* (*y*), where the intended husband had undertaken as agent of the intended wife to have a settlement prepared, and marriage articles were drawn up by a solicitor upon instructions given by the intended husband the night before the marriage, by which the wife's property was limited in the first instance to him for life, the Court held, in an action by the wife, that he was bound under the circumstances to have such a settlement prepared as the Court would sanction, that such settlement would give the wife the first-life interest in her own property, and that therefore the limitations were contrary to the intentions of the

Rectification of
marriage settle-
ment on ground
of fraud.

(*s*) *Sterry v. Coombs*, 40 L. J. Ch. 502.
595.

(*x*) *Corley v. Lord Stafford*, 1 D. &

(*t*) *Re Spencer*, 18 W. R. 240. J. 239.

(*u*) *Watt v. Grove*, 2 Sch. & Lef. (y) 7 Ch. D. 18.

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plaintiff, and it was ordered that the settlement should be rectified (z). The order was made on the uncorroborated testimony of the wife (a).

So, also, in *Smith v. Iliffe* (b), a lady, a ward of Court, had married during her minority, and the Court had approved of the settlement. Her personalty was by the instrument limited on the death of her husband and in default of children (both which events had happened) to the wife as she should by will appoint, and in default to her next of kin. She complained that the Court had not provided for her interests as they ought to have been provided for, she being an infant; and the Court held that it was the right of the lady after the death of the husband to have the settlement reformed and put in such a shape as the Court would have approved of if the thing were new and nothing had been done, and rectified the settlement by limiting the property in the events which had happened to herself, her executors, and administrators absolutely (c).

Another class of cases in which the Court will rectify a settlement is when an action is brought by the grantor to set aside a voluntary deed in so far as it conferred a benefit on collateral volunteers on the ground that the grantor did not know the precise effect of the deed which he had executed or the consequences of its execution. In a case, accordingly, where the Court was satisfied that a lady did not understand the true effect of the limitation to collaterals in a voluntary deed executed by her, that it was not properly explained to her, and that the instructions she had given for the preparation of the settlement were materially departed from, a decree was made that the limitation in question to collaterals should be cancelled, and a clause introduced so as to bring the settlement into accordance with the instructions she had given (d).

The Court may in the exercise of its equitable powers relieve against fraud by converting the person guilty of the fraud into a trustee for the person defrauded. In cases, for instance,

(z) See *Lovesy v. Smith*, 15 Ch. D. 655.

(a) *Ib.*

(b) 20 Eq. 666.

(c) See *Cogan v. Duffield*, 20 Eq. 789.

(d) *Maunsell v. Maunsell*, 1 L. R. 1, 547.

where a man has fraudulently appropriated to his own use monies belonging to another, the Court will declare him a trustee of such monies, and order him to make them good (*e*).

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The Court will relieve against fraud in judicial proceedings. If a party has been induced by fraud to consent to a decree, or if fraud in obtaining a decree has been practised on the Court, the Court will grant relief on being satisfied that the conduct of the party himself has not deprived him of his title to relief, and that the relief can be given with due regard to the just interests of others (*f*).

Relief against
decrees, judg-
ments, probates,
&c.

Where any fraud or collusion has been practised, a sale and conveyance cannot be held valid, although they have the colourable protection of a decree of the Court (*g*). The orders of the Court cannot, however, be set aside on grounds less strong than those which would be required to set aside transactions between competent parties (*h*). To set aside on the ground of fraud a decree signed and enrolled, actual positive fraud must be shown. There must be on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion, and acting, in order to take an undue advantage for the purpose of actually and knowingly committing a fraud. The fraud must be a fraud which can be explained and defined upon the face of the decree. Mere irregularity, or the insisting upon rights, which upon a due investigation of those rights might be found to be overstated, or over-estimated, is not the kind of fraud which will authorise the Court to set aside a decree (*i*).

Though the Court of Chancery could not set aside the judgment of a common law court obtained against conscience, it would consider the person who had obtained a judgment as a trustee, and would decree him to reconvey any property that he might have become possessed of under the judgment, on the

(*e*) *Rolfe v. Gregory*, 4 D. J. & S. 576; *Charlton v. Coombs*, 4 Giff. 385; *Spencer v. Clarke*, 9 Ch. D. 137.

(*f*) *Barnesly v. Powell*, 1 Ves. 120, 285; *Davenport v. Stafford*, 8 Beav. 522; *Shand v. Du Buisson*, 18

Eq. 283, *supra*, pp. 4, 326.

(*g*) *Colclough v. Bolger*, 4 Dow. 64.

(*h*) *Brooke v. Lord Mostyn*, 2 D. J. & S. 416.

(*i*) *Patch v. Ward*, 3 Ch. 203; comp. *Monckton v. Braddell*, 1 R. 7 Eq. 41.

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ground of laying hold of his conscience, so as to make him do that which was necessary to restore matters as before (*k*). With respect to fines which had been obtained by fraud, the Court would not absolutely set aside a fine so obtained, nor would it send the party aggrieved to the Court of Common Pleas to get it vacated. The course of the Court was to consider all persons taking an estate under the fine with notice of the fraud as trustees for the party defrauded, and to decree a reconveyance of the land, on the general ground of laying hold of the conscience of the parties to make them do that which was necessary for restoring matters to their former position (*l*).

Though the Court of Chancery had no jurisdiction to relieve against fraud in obtaining the setting up or execution of a will (*m*), it would relieve against a probate obtained by fraud by converting the party taking under the instrument into a trustee for the party defrauded (*n*).

"The cases," said Lord Lyndhurst, in *Allen v. Macpherson* (*o*), "in which this Court has declared a legatee or executor to be a trustee for other persons have been cases in which there have been either questions of construction (*p*), or cases in which the party has been named as trustee, or has engaged to take as such (*q*), or in which the Court of Probate could afford no adequate or proper remedy (*r*)."
A legacy given to a person in a character which the legatee does not fill, and by the fraudulent assumption of which character the testator has been deceived, will not take effect. A false character, however, attributed by a testator to a legatee will not affect the validity

(*k*) *Barnesly v. Powell*, 1 Ves. 120, 285.

(*l*) Cruise Dig. tit. xxxv., c. 14, s. 12. See *Pickett v. Loggon*, 14 Ves. 234; *Hampson v. Hampson*, 3 V. & B. 42; *Langley v. Fisher*, 9 Beav. 100; *Tarleton v. Liddell*, 17 Q. B. 414.

(*m*) *Allen v. Macpherson*, 1 H. L. 191.

(*n*) *Barnesly v. Powell*, 1 Ves.

287; *Allen v. Macpherson*, 1 Ph. 145, 1 H. L. 213.

(*o*) 1 H. L. 214.

(*p*) *Kennell v. Abbott*, 4 Ves. 802.

(*q*) *Thynn v. Thynn*, 1 Vern. 296; *Kennell v. Abbott*, 4 Ves. 802; *Podmore v. Gunning*, 7 Sim. 660.

(*r*) See *Segrave v. Kirran*, Beat. 157; *Charlton v. Coombs*, 4 Giff. 385; *Wilkinson v. Joughin*, 2 Eq. 319.

of the legacy, unless the false character has been acquired by a fraud which deceived the testator (s).

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“A court of equity,” said Lord Westbury, in *McCormick v. Grogan* (t), “has from a very early period decided that even an Act of Parliament shall not be used as an instrument of fraud, and if, in the machinery of perpetrating a fraud, an Act of Parliament intervenes, a court of equity does not, it is true, set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation because he applies the Act as an instrument for accomplishing a fraud. In this way the Court has dealt with the Statute of Frauds, and in this manner also it deals with the Statute of Wills. If an individual on his death-bed or at any other time is persuaded by his heir at law or his next of kin to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but at the same time says to the individual that he has a purpose to answer which he has not expressed in the will, but which he depends on the donee to carry into effect, and the donee assents to the request, the heir at law in the one case, and the donee in the other, will, if it clearly and distinctly appear that he has acted *malo animo* and that the testator was beguiled and deceived by his conduct, be converted into trustees simply on the principle that an individual shall not be benefited by his own wrong.”

A charter which has been obtained from the Crown by fraud, may be repealed by *sci. fa.*; but so long as it remains unrepealed its validity cannot be disputed (u).

SECTION II.—ACTION OF DECEIT—DAMAGES.

An action on the case for damages in the nature of a writ of deceit lies against a man for making a false and fraudulent

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(s) *Giles v. Giles*, 1 Keen, 692; *Re Boddington*, 22 Ch. D. 602.

(t) 4 E. & I. App. Ca. 97.

(u) See *Macbride v. Lindsay*, 9

Ha. 574. See as to setting aside letters patent obtained by fraud, *Att.-Gen. v. Vernon*, 1 Vern. 369.

representation, whereby another is induced to enter into a transaction and by so doing sustains damage (*v*). If the representation be false, it is immaterial that it may have been made without any fraudulent intent or that the party who made it may have derived no benefit from it (*x*). Fraud accompanied by damage is in all cases a good ground of action (*y*). But to maintain an action of deceit, it is not necessary that the person who made the representation should know it to be false; it is enough that the representation be false, if it be made recklessly without any reasonable grounds for believing it to be true, or under circumstances which show that the person making it was careless whether it was in fact true or false, and be made deliberately and in such a way as to give the person to whom it is made reasonable grounds for believing that it was meant to be acted on and has been acted on by him accordingly (*z*). There is, indeed, fraud to support an action of deceit if a man asserts that to be true within his own knowledge which he does not know to be true, or makes an assertion of fact as to which he is ignorant whether it is true or false and it is in fact untrue (*u*). A representation, however, honestly believed to be true by the party making it, is not independently of a duty cast on him to know the truth, a good cause of action, although it may prove to be untrue (*b*), nor indeed is a rash assertion a ground for an action of deceit, unless there be recklessness as to whether it was true or false (*c*). But if a duty be cast upon a man to know the truth and he makes a representation in such a way as to induce a reasonable man to believe that it is true and is meant to be acted on, he cannot be heard to say, if the representation proves to be untrue, that he believed it to be true and made the misstatement through mistake, ignorance, or forgetfulness (*d*).

(*v*) *Pasley v. Freeman*, 3 T. R. 52, ~ 242, per Cotton, L. J.; *Redgrave v. Hurd*, 20 Ch. D. 13, *supra*, pp. 16, 17.

(*x*) *Polhill v. Walter*, 3 B. & A. 114; *Foster v. Charles*, 7 Bing. 106, p. 16.

(*y*) *Ib.*; *Pasley v. Freeman*, 3 T. R. 52.

(*u*) *Ib.*; *Pasley v. Freeman*, 3 T. R. 52.

(*z*) *Taylor v. Ashton*, 11 M. & W. 415; *Weir v. Bell*, 3 Exch. D.

(*b*) *Haycraft v. Creasy*, 2 East, 92; *Ormrod v. Huth*, 14 M. & W. 651.

(*c*) *Schroeder v. Mendt*, 37 L. T. N. S. 452.

(*d*) *Moens v. Heyworth*, 10 M. &

A distinction must be drawn between an action of deceit and an action or proceeding to set aside a contract or to make the directors of a company answerable in damages for money which they have received. Mere concealment is not sufficient to give a right of action to a man who if the real facts had been known would not have entered into the contract. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure may be a ground in a proper proceeding and at a proper time for setting aside a contract, will not form a ground of action in the nature of an action of deceit. There must be some active misstatement of fact, or at all events such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false (*e*). In an action, moreover, for setting aside a contract which has been obtained by misrepresentation, the plaintiff may succeed, although the misrepresentation was innocent; but in an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false or with a reckless disregard as to whether it is or is not true. The coming into existence of a fact which would have made a statement in the prospectus untrue if it had existed at the time of issuing the prospectus will not in an action for deceit entitle the plaintiff to relief: nor are persons issuing a prospectus liable to an action for deceit because they do not mention a fact coming to their knowledge before the allotment of shares which falsifies the prospectus. Moreover in an action of deceit the plaintiff cannot establish a title to relief simply by showing that the defendants have made a fraudulent statement; he must also show that he was deceived by the statement and acted on it to his prejudice (*f*).

To be a ground for an action of deceit the false statement must be material. With respect to the materiality of the

W. 147; *Doyle v. Hort*, 4 L. R. I. 668; *Phelps v. White*, 7 L. R. I. 160, *supra*, p. 29.

(*e*) *Peek v. Gurney*, 6 E. & I. App.

Ca. 403, *per* Lord Cairns.

(*f*) *Arkwright v. Newbold*, 17 Ch. D. 320; *Smith v. Chadwick*, 20 Ch. D. 27.

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statement, if the Court sees on the face of it that it is of such a nature as would induce a person to enter into a contract or would tend to induce him to do so or that it would be part of the inducement to enter into the contract, the inference is if he entered into the contract, that he acted on the inducement so held out, and no evidence is needed to show that he did so act; but even then it may be shown that in fact he did not so act in one of two ways, either by showing that he knew the truth before he entered into the contract and therefore could not rely on the misstatement, or else by showing that he avowedly did not rely on it whether he knew the facts or not. He may by contract have bound himself not to rely on it, that is, to take the matter at his own risk, whether it were true or not, but unless it is shown in one way or other that he did not rely on the statement, the inference follows. Again, in an action of deceit, even though the statement may be untrue, yet if it was made in good faith and the defendant had reasonable grounds for believing it to be true, the action will not lie (*g*). Finally, it is not every misstatement, although untrue, and untrue to the defendant's knowledge, that will do. It may be that the misstatement is trivial—so trivial that the Court will be of opinion that it could not have affected the plaintiff's mind at all, or induced him to enter into the contract; or it may be although the means of knowledge were in the hands of the defendant, yet the matter was minute and required a careful examination, and there may have been reasonable grounds for the defendant to believe that this statement was true, although he had those means of knowledge in his possession. In that way also he would be entitled to succeed (*h*).

In a case where there was a misstatement of the valuation of a property in the prospectus of a company to the amount of 3000*l.* out of 300,000*l.* the misstatement was held not material (*i*). So also, when money was to be paid by instalments, the omission to mention that interest was also payable was held not material (*k*).

(*g*) *Smith v. Chadwick*, 20 Ch. D. 44, *per* Jessel, M. R. (*i*) *Ib.*
(*h*) *Ib.* (*k*) *Ib.*

If the name of a person is improperly placed on the list of directors of a company, it must depend on the circumstances of the case whether it is a material misstatement. There may be cases in which the name of a man is so well known and notorious in connection with the business and subject matter of a company that the occurrence of his name on the list of directors would be clear and undoubted inducement to persons to embark in the concern. But in the absence of some special reason, the mere fact that one name out of several happens to be wrongly inserted in the list of directors is not sufficient to support an action of deceit (*l*).

An action of deceit will not lie if the Court shall be of opinion that the representations in the prospectus of a company, though in some respects inaccurate and not free from carelessness, are a fair, honest, and *bonâ fide* statement on the part of the defendant. If once the Court comes to the conclusion that the persons who made the representations intended to act honestly, and there is any doubt as to the meaning of the terms, the rule will prevail that things will be presumed to have been done rightly. If a statement by which the plaintiff says he has been deceived is ambiguous, he is bound to state the meaning which he attached to it and cannot leave the Court to put a meaning on it (*m*). In a case where the defendants sent to the plaintiff the prospectus of a company for which they acted as agents, on the faith of which the plaintiff took shares in the company; and a few days afterwards the defendants sent to the plaintiff a circular containing other statements respecting the company, but the plaintiff did not receive it till after he had taken the shares; it was held that the circular could not be taken as a contemporaneous document with the prospectus and could not be read for the purpose of explaining it (*n*).

Where a transaction has been induced by fraud but rescission is not competent to the party defrauded, either because the parties cannot be restored to their original condition (*o*), or because the person by whose fraud the transaction has been

(*l*) *Smith v. Chadwick*, 20 Ch. D. 27.

44. (n) *Ib.*

(*m*) *Smith v. Chadwick*, 20 Ch. D. (o) *Supra*, p. 367.

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induced is not a party to the transaction (*p*), the party defrauded may bring an action of deceit against the party by whose fraud he has been misled to his injury (*q*). So also the party defrauded may if he pleases stand to the contract after discovery of the fraud, and recover damages in an action of deceit for the fraud (*r*). So also an action of deceit will lie if A. makes inquiry of B. as to the circumstances and solvency of C., and B. fraudulently misrepresents them, in consequence of which A. sells goods to C. and suffers loss thereby (*s*). So also where a man enters into a contract for the sale of real estate, knowing that he has no title to it nor any means of acquiring it, the purchaser may recover damages in an action of deceit (*t*).

A purchaser may, after the execution of a conveyance, bring an action for compensation in damages for fraudulent misrepresentation of the property (*u*). The fact that he had the means of discovering an error amounting in law to fraudulent misrepresentation before completion does not take away his right to compensation in damages, if the Court is satisfied that the error was not in fact discovered by himself or his solicitor until after the completion of the purchase (*x*).

Where the owners of a mine or other business, which they know to be a failure, in order to retrieve sell it at a large price to a trustee for a company consisting of themselves in which they all take shares, there is not as between themselves a fraud of which any of them can complain. But if any of the shareholders of the new company sell his shares to anybody of the outside public upon the faith of the simulated agreement for the purchase of the undertaking being a true one, the person so deceived has his remedy against the person who sold him the

(*p*) *Supra*, pp. 393, 394.

(*q*) *Pasley v. Freeman*, 3 T. R. 62;
Masters v. Ibberson, 8 C. B. 100;
Taylor v. Ashton, 11 M. & W. 413;
Pulsford v. Richards, 17 Beav. 95;
Duranty's Case, 26 Beav. 271.

(*r*) *Supra*, pp. 383, 384.

(*s*) *Hutchinson v. Bell*, 1 Taunt.
558; *Tapp v. Lee*, 3 B. & P. 370;
Eyre v. Dunsford, 1 East, 318;

Hamar v. Alexander, 2 B. & P. N. C.
241; *Clifford v. Brooke*, 13 Ves. 133;
Bruce v. Ruler, 2 Man. & R. 3.

(*t*) *Bain v. Fothergill*, 7 E. & I.
App. Ca. 207.

(*u*) *Dobell v. Stephens*, 3 B. & C.
623; *Pillmore v. Hood*, 5 Bing. N.
C. 97.

(*x*) *Phelps v. White*, 7 L. R. I.
160.

shares, but there would be no liability on the part of the company as such (*y*).

Under Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 6, no action shall be brought whereby to charge any person upon or by reason of any representation or assurance, made or given concerning or relating to the character, credit, conduct, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon, unless such representation or assurance be made in writing signed by the party to be charged therewith. A representation partly written and partly verbal is sufficient, if the written part forms a material part of the representation (*z*).

The representation must be signed by the party, a signature by his agent will not suffice (*a*).

The word "person" applies to corporations (*b*). One partner of a firm signing such a representation in the name of the firm with the authority of the firm will thereby make himself only, and not his partners liable on such representation (*c*).

A principal is liable to third persons for frauds, deceits, concealments, torts, and omissions of duty of his agent, when acting in the course of his employment, although the principal did not authorise or justify or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them. But the principal is not liable for the torts, or negligence of his agent in any matter beyond the scope of his agency, unless he has expressly authorised or has subsequently adopted them for his own use and benefit (*d*).

It was formerly considered to be the law that to found an action of deceit, the fraud must be a personal one on the part of the person making the representation, and that a principal was not liable in damages for the false representation of his agent, unless he had impliedly authorised him to make the representa-

(*y*) *Ex parte Taylor*, 14 Ch. D. 390. Bing. N. C. 669.

(*z*) *Tatton v. Wade*, 18 C. B. 371.

(*e*) *Williams v. Mason*, 28 L. T. 232.

(*a*) *Swift v. Jewsbury*, L. R. 9 Q. B. 301; *Hosegood v. Bull*, 36 L. T. 617.

(*d*) *McGowan v. Dyer*, L. R. 8 Q. B. 145, per Lord Blackburn.

(*b*) *Boyd v. Croydon Railway Co.*, 4

tion (e). But in *Barwick v. English Joint Stock Bank* (f), Mr. Justice Willes in delivering the judgment of the Court laid it down as the law that an innocent principal is civilly responsible for the fraud of his authorised agent acting within his authority, and in the course of the business which he is employed to perform, to the same extent as if it were his own fraud.

This doctrine of law proceeds not on the ground of any imputation of vicarious fraud to the principal, but because with respect to the question as to the liability of a principal for the acts of his agent done in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and any other wrong. The principle of the law of agency applies equally to all such cases. It may be that the master has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he is answerable for the manner in which that agent has conducted himself in doing the business which it was the act of the master to place him in (g). It is of course assumed in all such cases that the third party who may seek for redress has been dealing in good faith with the agent in reliance upon the credentials with which he has been entrusted by the principal, and had no notice, either of any limitation material to the question of the agent's authority, or of any fraud or other wrongdoing on the agent's part at the time when the cause of action arose (h).

A company, whether incorporated or not, is like any other principal liable to an action of deceit for the misrepresentation of its directors or other agents, if the statement relates to a matter as to which they are agents, and if it be made in the course and as part of the business which they are appointed by the company to transact (i). This doctrine was approved of in

(e) *Udell v. Atherton*, 7 H. & N. 172, per Martin, B.; *Western Bank of Scotland v. Addie*, 1 Sc. App. Ca. 162, per Lords Chelmsford and Cranworth.

(f) L. R. 2 Exch. 265.

(g) *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 265; *Houldsworth v. City of Glasgow Bank*, 5 App.

Ca. 326, per Lord Selborne; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394.

(h) *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 326, per Lord Selborne.

(i) *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 265.

Mackay v. Commercial Bank of New Brunswick (j). In that case the officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently and without the knowledge of the president and directors of the bank, made a representation to a man, which by omitting a material fact misled him and induced him to accept a bill in which the bank was interested, and he was compelled to pay the bill. It was held he could recover from the bank the amount so paid. "*Barwick v. English Joint Stock Bank*," said Lord Blackburn in *Houldsworth v. City of Glasgow Bank* (k), "was decided just before the decision in *Addie v. Western Bank of Scotland*, and the noble and learned Lords who advised the House were not aware of the decision. One point there decided was that in the old form of English pleading, the fraud of the agent was described as the fraud of the principal though innocent. This was a very technical question. The substantial point decided was that an innocent principal was civilly responsible for the fraud of his authorised agent acting within his authority to the same extent as if it were his own fraud. It is not necessary now to decide whether that was right or wrong as the law stood before the decision in *Addie v. Western Bank of Scotland*, nor whether it was overruled by that decision. *Mackay v. Commercial Bank of New Brunswick* was decided after *Addie v. Western Bank of Scotland* and was distinguished from it. I do not think your Lordships need inquire whether successfully or not."

The principle on which *Barwick v. English Joint Stock Bank* proceeded was followed in *Swire v. Francis* (l), and *Weir v. Bell* (m). But in the latter case Lord Bramwell said he did not consider the reasoning on which *Barwick v. English Joint Stock Bank* was founded was satisfactory, but, nevertheless, he thought it might be supported on other grounds. "I think," he said, "that every person who authorises another to act for him in the making of any contract undertakes for the absence of fraud in that person in the execution of the authority given

(j) L. R. 5 P. C. 394.

(k) 5 App. Ca. 339.

(l) 3 App. Ca. 113.

(m) 3 Exch. D. 244.

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as much as he undertakes for the absence . . . in himself when he makes the contract."

Action of deceit under Companies Act, 1867, s. 38, against directors of companies.

When the prospectus of a company omits to specify contracts entered into by the promoters or directors or trustees of the company before the issue of such prospectus, as required by sect. 38 of the Companies Act, 1867, a man who has been induced by the concealment to take shares in the company has his remedy against the directors issuing the prospectus, and may recover from them the price he paid for his shares (*n*).

One agent not liable for fraud of other agent.

As a general rule one agent is not responsible for the acts of another agent unless he does something by which he makes himself a principal in the fraud (*o*). The director of a company, for instance, is not liable for a fraud, such as the issue of a fraudulent prospectus, committed by his co-directors or any other agent of the company, unless he has either expressly authorised or tacitly permitted its commission (*p*). But if the director or promoter of a company knows all that his fellow directors or promoters knew, and gives authority to them to issue a prospectus, and it appears that looking at the circumstances of the case, he must be deemed to have given authority to issue such a prospectus as was actually issued, and that he could not have supposed that a prospectus telling the whole truth could ever be issued, he cannot avail himself of the defence that he had not taken a part in preparing or issuing the prospectus (*q*).

Laches.

A man who has by his laches or delay barred his right to repudiate a contract to take shares in a company on the ground of fraudulent representation cannot maintain an action of deceit against the directors for damages founded on the same misrepresentation (*r*).

Measure of damages.

In actions of deceit the measure of damages is not the full consideration which has passed from the defrauded party. Any benefits received by him under the contract must be taken into

(*n*) *Gover's Case*, 1 Ch. D. 182 ;
Charlton v. Hay, 31 L. T. N. S. 437 ;
Sullivan v. Mitcalfe, 5 C. P. D. 455 ;
Jury v. Stoker, 9 L. R. I. 397. See
supra, pp. 77—81, as to construction
of the clause.

(*o*) *Cargill v. Bower*, 10 Ch. D. 514.

(*p*) *Ib.*

(*q*) *Ib.* ; *Peek v. Gurney*, 6 E. & I.
App. Ca. 378.

(*r*) *Ogilvie v. Currie*, 37 L. J. Ch.
541 ; *Peek v. Gurney*, 13 Eq. 79.

consideration, and the damages recoverable will be the excess only of the value of the one over the other (*s*). The measure of damages is the difference between the actual value of the property and its value if the property had been what it was represented to be. When a man has been induced by false representations in a prospectus to take shares in the company, the proper mode of measuring the damages is to ascertain the difference between the purchase-money and what would have been a fair price to be paid for the shares in the circumstances of the company at the time of the purchase (*t*). The party defrauded can only recover damages to the extent of the loss he has actually sustained. He cannot recover the entire price he paid unless the thing prove wholly worthless. If the article which he has been induced to buy is of any value, that value in assessing the damages must be deducted from the price. If the article had any value and he has by his own act diminished or destroyed that value, he cannot throw the loss so occasioned on the defendant. But if the article was worthless from the beginning and only derived its apparent value from the representation which has proved false, the measure of damages is the price which the plaintiff was induced to give for it by the fraud on which the action is founded. If the article was a share in a company it may be that it may have had some fictitious value in the share market at the time of the purchase, but the plaintiff having invested was not bound to sell it immediately. He was fully entitled to wait until the company was in operation (*u*).

Where there is a fraudulent misrepresentation of the character or condition of goods, the vendor is responsible for all injury which is the direct and natural result of the purchaser acting on the faith of the representation. Where, therefore, a cattle dealer fraudulently represented a cow to be free from infectious disease when he knew it was not so, and the purchaser placed it with five others which caught the disease and

(*s*) *Hogan v. Healey*, 11 C. D. 302.

L. 122.

(*u*) *Twycross v. Grant*, 2 C. P. D.

(*t*) *Davidson v. Tulloch*, 3 Macq. 469. See *Jury v. Stoker*, 9 L. R. I. 798; *Arkwright v. Newbold*, 17 Ch. 397.

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died, the latter was held entitled to recover as damages in an action for fraudulent misrepresentation the value of all the cows (*x*).

In an action for false representation the plaintiff cannot recover damages if they are too remote and not the immediate consequence of the defendant's act (*y*). Costs incurred upon the discovery of the falsehood of a representation in order to reverse the consequences of the representation are too remote an injury to be included in a verdict upon an action of deceit (*z*).

In a case where a man had purchased shares under a forged transfer, and the name of the real owner was afterwards substituted, it was held that the purchaser was entitled to recover from the company for their negligence in registering the forged transfer, as damages for the loss of the shares, the value of the shares at the time the company first refused to recognise him as a shareholder, with interest at four per cent (*a*).

If a mine owner fraudulently works into the mines of his neighbour and abstracts his minerals, he will be charged the full value of the minerals when gotten, without being allowed the expenses of getting and severing them. The expenses, however, of raising the minerals to the pit's mouth will be allowed him (*b*). He will also have to pay compensation for the use of a way-leave under the land. If he dies, his executor will not after his death be liable in damages for what damage the owner of the mine may have sustained by the abstraction of coal from under his land. The estate of the wrongdoer is only liable for such profit as it may have derived from the fraud (*c*).

When a person employed to purchase purchases secretly from himself but the fraud complained of does not touch the value

(*x*) *Mullett v. Mason*, L. R. 1 C. P. 559.

(*y*) *Collins v. Care*, 4 H. & N. 225; *Barry v. Crosskey*, 2 J. & H. 1; *Peck v. Gurney*, 6 E. & I. App. Ca. 412. See *Barber v. Lesiter*, 7 C. B. N. S. 175.

(*z*) *Hyde v. Bulmer*, 18 L. T. N. S. 293.

(*a*) *Re Bahia & San Francisco Railway*, L. R. 3 Q. B. 594.

(*b*) *Llynvi Co. v. Brogden*, 11 Eq. 188; *Philipps v. Homfray*, 6 Ch. 770; but see *Jegon v. Vivian*, 6 Ch. 742.

(*c*) *Philipps v. Homfray*, W. N. (1883), 40.

of the article sold, but consisted only of the fraudulent concealment by the agent that he was selling to his principal, the proper measure of damages is the difference which the agent paid and the price at which the principal might have re-sold it upon the same day upon which he bought it from the agent. What occurs afterwards cannot be taken into account (*d*).

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SECTION III.—INJUNCTION—RECEIVER.

The appropriate remedy of the Court may under the peculiar circumstances of the case be by way of injunction. In restraining by injunction acts which are fraudulent the Court exercises a most extensive jurisdiction. Injunctions may be had upon a proper case being made out to restrain a man from parting with or transferring property, or paying or recovering monies (*e*), from negotiating securities (*f*), from selling property, &c. (*g*). So also injunctions may be had to restrain the piracy of trade marks (*h*). So, also, if a man has by his conduct encouraged another to expend monies on property, or deal in a matter of interest, the Court will restrain him from derogating from the interest in which that other has been induced to deal, or from enforcing his legal right against him, unless the latter has received the benefit which he contemplated at the time he was induced to alter his condition (*i*). Where, accordingly, a lessor, pending an agreement for a building lease, represented to the intended lessee that he could not obstruct the sea view from the houses to be built by the lessee, pursuant to the proposed lease, because he himself was a lessee under a lease for 999 years, containing covenants which restricted him from so doing; but after the building lease had been taken, and the houses built upon the faith of the representation, the lessor surrendered his 999 years' lease, and took a new lease omitting the restrictive covenants, the Court restrained him by injunction from building so as to

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(*d*) *Waddell v. Blockey*, 4 Q. B. D. 680.

(*e*) *Kerr on Inj.* 531.

(*f*) *Ib.* 530.

(*g*) *Ib.* 528.

(*h*) *Kerr on Inj.*, 357 — 383; *Johnston & Co. v. Orr Ewing*, 7 App. Ca. 219; *Singer, &c., Co. v. Looy*, 8 App. Ca. 15.

(*i*) *Supra*, p. 97.

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obstruct the sea view (*k*). So, also, where on one of two partners retiring from business, it was left to arbitration to determine what was to be paid to the retiring partner for the goodwill of the business, and the arbitrators, on the clear understanding of the parties that the retiring partner would not set up trade in the vicinity, allowed him 500*l.* as his share of the goodwill, but the award was silent on the subject; the Court, nevertheless, upon parol evidence of the understanding on which the award was made, restrained him from carrying on trade in the same vicinity (*l*). So, also, a man who has permitted the owner of the adjoining premises to rebuild them to a greater height than they were before, and to alter his ancient lights and to open new ones, will be restrained by injunction from interrupting the lights after they are completed (*m*). If a fair *prima facie* case of fraud be made out by the bill, the Court may appoint a receiver before the hearing (*n*).

SECTION IV.—DEFENCE TO SPECIFIC PERFORMANCE.

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Fraud a bar to
specific perform-
ance.

Where a party comes to the Court for specific performance of a contract, he must as to every part of the transaction be free from any imputation of fraud or deceit. An agreement affected by misrepresentation or tainted by deceit is incapable of being made the subject of the interference of the Court in order to compel its specific performance (*o*). When the aid of the Court is sought by way of specific performance of a contract, the principles of ethics have a more extensive sway than when a contract is sought to be rescinded. The Court is not bound to decree specific performance in every case where it will not set aside a contract, or to set aside every contract that it will not specifically perform (*p*). When the rescission of a contract is

(*k*) *Piggott v. Stratton*, John. 359,
1 D. F. & J. 33.

(*l*) *Harrison v. Gardiner*, 2 Madd.
198.

(*m*) *Cotching v. Bassett*, 32 Beav.
101. See further, *supra*, 96—102;
Kerr on Inj. 184.

(*n*) *Stillwell v. Jenkins*, Jac. 280;
Kerr on Receivers, 58.

(*o*) *Harris v. Kemble*, 7 L. J. Ch.
83, 5 Bligh, 730. See *Walters v.*
Morgan, 3 D. F. & J. 718.

(*p*) *Cadman v. Horner*, 18 Ves. 10;

sought, a case must be made out showing that the transaction is not only unfit to be acted on in equity, but is also unfit to be acted on at law (*q*); but it does not follow, though a contract be good in point of law, that it must be carried into execution in equity. Many circumstances may operate to induce a court of equity to refuse its assistance, though the agreement may stand the test of a court of law (*r*). The Court in such cases simply refuses to interfere, leaving the parties to such consequences as may follow from the legal rights which the contract may have given them (*s*). Specific performance rests with the discretion of the Court upon a view of all the circumstances (*t*), and with an eye to the substantial justice of the case (*u*). There can be no specific performance if a material and important fact be untruly stated (*x*), or if there be a misdescription of the property to a material extent in the conditions of sale (*y*). It is no answer, in a suit for specific performance, to the fact of the plaintiff having made a false representation, to say that the defendant was imprudent. A man who calls for specific performance must be able to show that his conduct has been clear, honourable, and fair (*z*). The Court must see its way very clearly before it will decree specific performance, and must be satisfied as to the integrity and good faith of the party seeking its interference (*a*). Misrepresentation as to a small portion only of the property, the subject of the contract, will, if the misrepresentation is intentional, prevent a man from coming

Vigers v. Pike, 8 Cl. & Fin. 645; *Wilde v. Gibson*, 1 H. L. 607; *Rawlins v. Wickham*, 3 D. & J. 322; *Broad v. Muntton*, 12 Ch. D. 131.

(*q*) *Vigers v. Pike*, 8 Cl. & Fin. 645. See *Willan v. Willan*, 2 Dow. 275.

(*r*) *Martin v. Mitchell*, 2 J. & W. 420; *Bartlett v. Salmon*, 6 D. M. & G. 33; *Higgins v. Samels*, 2 J. & H. 460.

(*s*) *Bellamy v. Sabine*, 2 Ph. 449; *Myers v. Watson*, 1 Sim. N. S. 529.

(*t*) *White v. Damon*, 7 Ves. 33; *Rudcliffe v. Warrington*, 12 Ves. 331;

Falcke v. Gray, 4 Drew. 659; *Watson v. Marston*, 4 D. M. & G. 230.

(*u*) *King v. Hamilton*, 4 Peters (Amer.), 311.

(*x*) *Price v. Macaulay*, 2 D. M. & G. 339.

(*y*) *Caballero v. Henty*, 9 Ch. 447; *Goddard v. Jeffreys*, 51 L. J. Ch. 57.

(*z*) *Cox v. Middleton*, 2 Drew. 220; *Walters v. Morgan*, 3 D. F. & J. 718. See *Philippis v. Homfray*, 6 Ch. 770.

(*a*) *Brealy v. Collins*, You. 327; *Walters v. Morgan*, 3 D. F. & J. 718.

to the Court to have the contract enforced. It is not sufficient that the vendor offer to waive the portion affected by the representation (*b*). The effect of a partial misrepresentation is not to alter or modify the agreement *pro tanto*, but to destroy it entirely, and to operate as a personal bar to the party making the application (*c*). Misrepresentation of a material fact, although innocently made, will be a bar to the application (*d*). If a prospectus be issued containing material representations, and a person accepts shares on the faith of the representations, the party who made the representations cannot, if they prove to be untrue, compel the other party to accept the shares, although he believed what he stated to be true (*e*). It is a defence to a bill for specific performance that the plaintiff has made inaccurate representations with respect to the property, the subject of the contract, although these representations proceeded upon and had reference to sources of information which were equally open to all parties, and might have enabled the defendant to detect the alleged inaccuracies, if the evidence shows that they could not have been easily detected (*f*). There may, however, be specific performance although the description of the property, the subject of the contract, be incorrect, if it appear that the purchaser knew at the time of the purchase that the representation was untrue, or inspected the property before making the purchase, and so acted upon his own judgment in the matter (*g*);

(*b*) *Viscount Clermont v. Tusburgh*, 1 J. & W. 119, 120.

(*c*) *Ib.*; *Stewart v. Alliston*, 1 Mer. 26. See *Rawlins v. Wickham*, 3 D. & J. 321.

(*d*) *Ainslie v. Medlycott*, 9 Ves. 13, 21; *Higginson v. Clowes*, 15 Ves. 524; *Stewart v. Alliston*, 1 Mer. 26; *Price v. Macaulay*, 2 D. M. & G. 339; *Higgins v. Samels*, 2 J. & H. 460; comp. *White v. Bradshaw*, 16 Jur. 738; *Hume v. Pocock*, 1 Ch. 379.

(*e*) *New Brunswick, &c., Railway Co. v. Muggeridge*, 1 Dr. & Sm. 363, 382.

(*f*) *Harris v. Kemble*, 7 L. J. Ch. 85, 5 Bligh, 730; *Denny v. Hancock*, 6 Ch. 1. See *Rawlins v. Wickham*, 3 D. & J. 318; *Higgins v. Samels*, 2 J. & H. 468; *Colby v. Gadsden*, 15 W. R. 1185.

(*g*) *Dyer v. Hargrave*, 10 Ves. 505; *Grant v. Munt*, Coop. 177; *Lord Brooke v. Roundthwaite*, 5 Ha. 306; *Haywood v. Cope*, 25 Beav. 140; *Clarke v. Mackintosh*, 4 Giff. 134; *Henderson v. Hudson*, 15 W. R. 860. Comp. *Higgins v. Samels*, 2 J. & H. 468; *Vivers v. Tuck*, 1 Moo. P. C. N. S. 526; *Denny v. Hancock*, 6 Ch. 1.

or if there were circumstances in the case which demanded further investigation, for which the vendor afforded every facility (*h*), or if the representations which have been made are vague in their terms, and merely amount to a statement of value or opinion (*i*).

So also may there be specific performance of a contract if the representation at the time of completion be accurate, although at the time of sale the representation was not correct. When, accordingly, several cottages let to weekly tenants were put up for sale and described as "producing £73 a year," which was not correct at the time the particulars of sale were issued, but before the sale the vendors had entered into a contract to do certain repairs, and had given notice to the tenants that their rents would be raised, and before the day fixed for completion the repairs were done and the rents were raised threepence a week, so that on the day of completion the particulars were quite accurate, it was held there was not such a misrepresentation as to entitle the purchaser to resist specific performance (*k*). So, also, a misstatement in the particulars of sale of the length of the term for which a tenant of the vendor holds a portion of the property is not (in the absence of any evidence as to whether such misstatement is to the advantage of the purchaser or not) such a misrepresentation as will enable him to resist specific performance (*l*).

A representation of intention as to future acts upon faith in which the contract is made may be a ground for refusing specific performance; as where a vendor announced at the sale his intention of making improvements in the neighbourhood and approaches which would materially enhance the value of the property sold, the Court refused to give specific performance, unless he fulfilled the expectation held out to the purchaser (*m*). So, also, specific performance of an agreement to take a lease was refused, although the lessee had taken possession and

(*h*) *Clarke v. Mackintosh*, 4 Giff. 134.

(*i*) *Scott v. Hanson*, 1 R. & M. 128; *Johnson v. Smart*, 2 Giff. 151, *supra*, pp. 42, 43, 44.

(*k*) *Goddard v. Jeffryes*, 51 L. J. Ch. 67.

(*l*) *Ib.*

(*m*) *Beaumont v. Dukes*, Jac. 422; *Myers v. Watson*, 1 Sim. N. S. 523.

occupied for two years, on the ground that the lessor had not fulfilled promises made to improve the premises (*n*).

There cannot be specific performance if the description of the property is of so ambiguous a nature that it cannot with certainty be known what it was the purchaser imagined himself he was contracting for (*o*). A vendor of property who makes statements respecting the property, is bound to make them free from all ambiguity; and the purchaser is not bound to take upon himself the peril of ascertaining the true meaning of the statements (*p*). A definite representation upon a fact affecting the value of the subject of sale will entitle the purchaser, if the representation be untrue, to resist specific performance (*q*). It is the duty of every vendor to state all the circumstances connected with the property he is selling, and the incidents to which it is subject, in such a manner that they can be understood by a person of ordinary intelligence, and not merely in such a way that only a skilled lawyer would be able to ascertain the nature of the title under which he is purchasing (*r*). If leasehold property, which is sold in separate lots, is held under one lease, it is incumbent on the vendor to state the fact in plain and distinct language (*s*).

An agent empowered by a vendor to find a purchaser has authority to describe the property, and to state any fact or circumstance which may affect the value, so as to bind the vendor. If the agent makes a false statement as to the description or value (though not instructed so to do) which the purchaser is led to believe and upon which he relies, the vendor cannot have specific performance (*t*).

If there be unusual covenants in a lease, and the seller is silent as to their existence, he will not be able to enforce specific

(*n*) *Lumare v. Dixon*, 6 E. & I. Beav. 430.
App. Ca. 414.

(*o*) *Stewart v. Alliston*, 1 Mer. 26; Ha. 304.

Leyland v. Illingworth, 2 D. F. & J. 253.

(*p*) *Martin v. Cotter*, 3 J. & L. 496, 507; *Drysdale v. Mace*, 5 D. M. & G. 107; *Swaissland v. Deursley*, 29

(*q*) *Lord Brooke v. Roundthwaite*, 5

(*r*) *Sheard v. Venables*, 36 L. J. Ch. 922.

(*s*) *Ib.*

(*t*) *Mullens v. Miller*, 22 Ch. D. 194.

performance against a purchaser buying in ignorance of the covenants (*u*).

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Although, according to the decided cases, a vendor who contracts for the sale of leasehold property described as held under a lease cannot, if nothing further is said, make a good title, unless it is held under an original lease, yet in a case where the particulars and conditions of sale of property so described contain enough to give notice to a purchaser that the property was held under a derivative lease, the purchaser cannot on that account refuse to complete or claim compensation on the ground of misdescription (*x*).

In sales by the Court, the Court ought to treat the purchaser more liberally than in the case of ordinary sales (*y*).

A purchaser cannot, however, on the application for specific performance, take advantage of small circumstances of variation in the description of the thing contracted for (*z*). Although the description of the property, the subject-matter of the contract, may be inaccurate in some particulars, or may be different in some respects and in certain incidents from what it was represented to be, specific performance will be decreed if the property is not different in substance from what it was represented to be, and the misrepresentation has been made innocently or through mistake, and not wilfully, upon the terms of the vendor making good his representation or allowing or giving compensation (*a*). If, for instance, the property be subject to incumbrances concealed from the purchaser, the seller may have specific performance on making good his assertion and redeeming those charges. So, also, if the property is subject to a small rent not stated, or the rental is somewhat less than it was represented to be (*b*), or if

Specific performance with compensation.

(*u*) *Martin v. Cotter*, 3 J. & L. 506.

(*x*) *Camberwell, &c., Building Society v. Holloway*, 13 Ch. D. 754.

(*y*) *Arnold v. Arnold*, 14 Ch. D. 279.

(*z*) *Poole v. Shergold*, 1 Cox, 274 ; *Stewart v. Alliston*, 1 Mer. 26.

(*a*) *Howland v. Norris*, 1 Cox, 59 ;

Drewe v. Corp, 9 Ves. 368 ; *Hill v. Buckley*, 17 Ves. 394 ; *Pulsford v. Richards*, 17 Beav. 87, 96 ; *Price v. Macaulay*, 2 D. M. & G. 344.

(*b*) *Pulsford v. Richards*, 17 Beav. 87, 96, *per* Lord Romilly ; *Hughes v. Jones*, 3 D. F. & J. 207. See *Howland v. Norris*, 1 Cox, 61 ; *Pope v. Garland*, 4 Y. & C. 394.

the property is smaller than it was represented to be (*c*), or is not in the state and condition in which it was represented to be (*d*), there may be specific performance on the terms of the vendor allowing a sufficient deduction or abatement from the purchase-money (*e*). The principle on which the Court proceeds in such cases is, that if the purchaser gets substantially that for which he has contracted, a slight variation or deficiency will not entitle him to recede from his contract when compensation can be made in money for the difference (*f*). A purchaser cannot, however, be compelled, upon the principle of compensation, to take something substantially or materially different from that for which he contracted (*g*). There can be no specific performance if the description be inaccurate, and the Court feels that it cannot measure the difference between that which was promised and the actual fact, so as to found a proper basis for compensation (*h*). If, for example, a man has contracted for the purchase of a freehold, he will not be compelled to take a leasehold (though held for a very long term) (*i*), or a copyhold (*k*); nor can a man who has contracted for a copyhold be compelled to take a freehold (*l*); nor will a man be compelled to take property held in a different manner from that which is expressed or implied in the contract, as the assignment of an underlease instead of an original lease (*m*),

(*c*) *Hill v. Buckley*, 17 Ves. 395 ; *Winch v. Winchester*, 1 V. & B. 375 ; *Portman v. Mill*, 2 Russ. 570 ; *King v. Wilson*, 6 Beav. 124 ; *Frost v. Brewer*, 3 Jur. 165 ; *Ayles v. Cox*, 16 Beav. 23 ; *Arnold v. Arnold*, 14 Ch. D. 279.

(*d*) *Dyer v. Hargrave*, 10 Ves. 508 ; *Grant v. Munt*, Coop. 173 ; *Scott v. Hanson*, 1 R. & M. 131.

(*e*) See further Dart, V. & P. 1078 ; *Powell v. Elliott*, 10 Ch. 424.

(*f*) *Howland v. Norris*, 1 Cox, 61 ; *Dyer v. Hargrave*, 10 Ves. 507 ; *Magennis v. Fallon*, 2 Moll. 588 ; *Arnold v. Arnold*, 14 Ch. D. 279.

(*g*) *Drewe v. Corp*, 9 Ves. 368 ;

Magennis v. Fallon, 2 Moll. 588 ; *Flight v. Booth*, 1 Bing. N. C. 377 ; *Arnold v. Arnold*, 14 Ch. D. 279.

(*h*) *Lord Brooke v. Roundthwaite*, 5 Ha. 298 ; *Cox v. Coventon*, 31 Beav. 388.

(*i*) *Drewe v. Corp*, 9 Ves. 368.

(*k*) *Twining v. Morice*, 2 Bro. C. C. 331 ; *Hick v. Philipps*, Prec. Ch. 575 ; *Turquand v. Rhodes*, 37 L. J. Ch. 832. See *Earl of Durham v. Legard*, 34 Beav. 612.

(*l*) *Ayles v. Cox*, 16 Beav. 23.

(*m*) *Madeley v. Booth*, 2 Deg. & S. 718 ; but see *Camberwell, &c., Building Society v. Holloway*, 13 Ch. D. 754, *supra*, p. 419.

or of a redeemable instead of an absolute interest (*n*), or of an improved instead of a ground rent (*o*). Nor can a man who has contracted for an estate in possession be compelled to take a reversion expectant on a life estate (*p*), or on a subsisting or *à fortiori* a reversionary lease (*q*). Nor where the vendor has contracted to show a marketable title, will the purchaser be forced to complete, if the lease is subject to restrictive covenants (*r*). Nor will a man, who has been led by the representations of the vendor to believe that the property, the subject of sale, was in the possession of a tenant of the vendor, be compelled to take a mere right of entry (*s*). Nor can a man be compelled to take an estate where incumbrances or liabilities exist which would materially affect its enjoyment (*t*), or where the property to which a title cannot be made is a material part of the property bought, as where a man is led to believe that he is purchasing a farm or close, and the vendor can only make out a title to a portion of the farm or close (*u*). The Court will not compel a man to take compensation for that which can hardly be estimated by pecuniary value (*x*). Several of the cases to be found in the books have carried the subject of compensation farther than at the present time it would be carried (*y*).

When upon the sale of land, represented to consist of a certain specified number of acres, there proves to be a deficiency in quantity, such deficiency is properly the subject for compensation, if the deficiency be not too great. If the difference be great, there is no case for compensation. The party prejudiced by the error may, if he pleases, avoid the contract; but he can-

(*n*) *Coverley v. Burrell*, Sug. V. & P. 299; Dart, V. & P. 1073.

(*o*) *Stewart v. Alliston*, 1 Mer. 26.

(*p*) *Collier v. Jenkins*, You. 298.

(*q*) *Linahan v. Cotter*, 7 Ir. Eq. 176; Dart, V. & P. 1073.

(*r*) *Cato v. Thompson*, 9 Q. B. D. 618.

(*s*) *Lachlan v. Reynolds*, Kay, 54.

(*t*) Dart, V. & P. 1075.

(*u*) *Arnold v. Arnold*, 14 Ch. D. 279.

(*x*) *Dyer v. Hargrave*, 10 Ves. 507;

Magennis v. Fallon, 2 Moll. 588;

Fewster v. Turner, 6 Jur. 144; *Cato*

v. Thompson, 9 Q. B. D. 618.

(*y*) *Howland v. Norris*, 1 Cox, 61;

Dyer v. Hargrave, 10 Ves. 507;

Kuatchbull v. Grueber, 1 Madd. 153;

Magennis v. Fallon, 2 Moll. 588;

Collier v. Jenkins, You. 298; *Madeley*

v. Booth, 2 Deg. & S. 722; *Cato v.*

Thompson, 9 Q. B. D. 618.

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not have specific performance unless he is willing to perform the contract without compensation (z).

Conditions of sale providing for compensation in cases of error or mistake apply only to innocent errors or accidental slips, and not to cases where the subject matter of the contract is materially different in substance from what it was represented to be (a), nor to cases where the error amounts to a misrepresentation in law. The function of such conditions is to prevent such errors from either vitiating the contract altogether, or causing loss to the purchaser by holding him bound by a contract which through accident or inaccuracy it is not possible for the vendor literally to perform (b).

Specific performance not ordered on ground of false representations as to value, &c.

A false representation as to the value of property may be enough to induce the Court to withhold specific performance (c).

If a vendor affirm that the estate was valued by persons of competent judgment at a greater price than it was worth, and the purchaser acts on that representation (d), or if he falsely affirms that the estate had not been already in the market at a much lower price, and the purchaser acts on the representation and agrees to give him what he demands (e), the vendor cannot have specific performance.

In *Mullens v. Miller* (f), when an agent commissioned by a vendor to sell property made a false statement as to its value (though not instructed so to do) which the purchaser was led to believe and on which he relied, it was held that the vendor could not have specific performance.

Mere inadequacy of consideration is not a ground for resisting specific performance (g); but if the inadequacy is very great, specific performance will not be decreed (h).

(z) *Earl of Durham v. Legard*, 34 Beav. 612. See *Price v. North*, 2 Y. & C. 620.

(a) *Stewart v. Alliston*, 1 Mer. 26; *Shackleton v. Sutcliffe*, 1 Deg. & S. 620; *Madley v. Booth*, 2 Deg. & S. 722; *Ayles v. Cox*, 16 Beav. 23; *Dimmock v. Hallett*, 2 Ch. 29. Comp. *Leslie v. Thompson*, 9 Ha. 268; *Painter v. Nearby*, 11 Ha. 30.

(b) *Phelps v. White*, 7 L. R. 1, 160.

(c) *Burton v. Lister*, 3 Atk. 386;

Shirley v. Stratton, 1 Bro. C. C. 440; *Wall v. Stubbs*, 1 Madd. 81.

(d) Sug. V. & P. 2.

(e) *Roots v. Snelling*, 48 L. T. N. S. 216.

(f) 22 Ch. D. 194.

(g) *Abbott v. Swarder*, 4 Deg. & S. 456; *Bower v. Cooper*, 2 Ha. 408; *Borell v. Dunn*, ib. 440, per Wigram, V.-C.; *Haywood v. Cope*, 25 Beav. 140.

(h) *Fulke v. Gray*, 4 Drew. 659.

It is no defence to a bill for specific performance by the vendor that during the treaty he falsely assumed the character of agent for another, when in fact he was dealing on his own behalf, and that he thereby deceived the purchaser as to the party with whom he was dealing, provided the purchaser does not show that the deception induced him to enter into the contract, or occasioned any loss or inconvenience to him otherwise (*i*).

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Though a written agreement, if there be no fraud or mistake, binds according to its terms, although verbally a provision was agreed on which has not been inserted in the document, either of the parties, if sued in equity for a specific performance of the agreement, is entitled to ask the Court to remain neutral, unless the party suing him will consent to the performance of the omitted term (*k*). As, for instance, when the vendor refused to perform his agent's engagement that improvements should be executed on the adjoining property (*l*); or when the lessor of a house verbally promised the lessee before he executed the lease to put the house into complete repair (*m*). But if the vendor offer to perform the agreement with, if the defendant so desire, the parol variation or addition, this is sufficient, and the defendant cannot set up the want of a perfect written contract (*n*). Specific performance will not, however, be decreed with the parol agreement superinduced upon it, unless the party praying for the specific performance has conducted himself with perfect good faith (*o*). Parol evidence is admissible when there is a case for specific performance with compensation, but an express bargain to make a good title cannot be modified by parol evidence (*p*).

Specific performance with a variation proved by parol evidence.

As on the one hand a court of equity will not, at the suit of a vendor of property, enforce specific performance of a contract

Specific performance at suit of purchaser with compensation.

(*i*) *Fellowes v. Lord Gwydyr*, 1 R. & M. 83. See *Nelthorpe v. Holgate*, 1 Coll. 203.

(*k*) *Clarke v. Grant*, 14 Ves. 524; *Winch v. Winchester*, 1 V. & B. 378; *Martin v. Pycroft*, 2 D. M. & G. 795.

(*l*) *Myers v. Watson*, 1 Sim. N. S. 523, 529.

(*m*) *Chappell v. Gregory*, 34 Beav. 250.

(*n*) *Martin v. Pycroft*, 2 D. M. & G. 785.

(*o*) *Walters v. Morgan*, 3 D. F. & J. 725.

(*p*) *Cato v. Thompson*, 9 Q. B. D. 619.

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for the sale thereof, if the property is different in some material particulars from what it was represented to be, unless upon the terms of his allowing compensation, so, on the other hand, specific performance of a contract for the sale of property which has been inaccurately described through innocent mistake, will not be enforced at the suit of the purchaser, unless upon the terms of his submitting to allow compensation to the vendor (*q*).

No specific performance of an agreement in fraud of the public.

There can be no specific performance of an agreement, the subject matter and contents of which amount to a fraud on the public (*r*).

(*q*) *Leslie v. Thompson*, 9 Ha. 268; (*r*) *Post v. Marsh*, 16 Ch. D. 395.
Painter v. Navy, 11 Ha. 30.

CHAPTER VIII.

PLEADING.

IN actions brought for the purpose of impeaching transactions on the ground of fraud it is essential that the nature of the case should be distinctly and accurately stated. The facts must be so stated as to show distinctly that fraud is charged (*a*). A mere general charge of fraud, without alleging specific facts, is not sufficient to sustain the action. It must be shown in what the fraud consists, and how it has been effected. The fraud alleged must be set forth specifically in particular and in detail, so that the person against whom it is charged may have the opportunity of knowing what he has to meet, and of shaping his defence accordingly (*b*). Fraud is a conclusion of law; and it is wholly immaterial and insufficient to allege that an instrument has been obtained by fraud, unless the things done constituting the fraud are stated on the face of the statement of claim (*c*). Chap. VIII.

In civil proceedings it is in general sufficient to allege the misrepresentation relied on, and the facts and circumstances that render it fraudulent, without specifically alleging that it was made fraudulently, which is a legal inference from the facts. If the facts create a fraud it is not necessary to allege the fraudulent intention, nor will the word "fraud" create a fraud

(*a*) *Davey v. Garrett*, 7 Ch. D. 489, *per* Thesiger, L. J.

(*b*) *East India Co. v. Henchman*, 1 Ves. Jr. 287; *Small v. Attwood*, 6 Cl. & Fin. 233; *Wilde v. Gibson*, 1 H. L. 607; *Irvine v. Kirkpatrick*, 7 Bell, Sc. Ap. 186; *National Exchange Co. v. Drew*, 2 Macq. 120; *Smith v. Kay*, 7 H. L. 750; *New Brunswick,*

dc., Railway Co. v. Conybeare, 9 H. L. 711; *Hallows v. Fernie*, 3 Ch. 471; *Cargill v. Bower*, 10 Ch. D. 516; *Wallingford v. Mutual Society*, 5 App. Ca. 687.

(*c*) *Gilbert v. Lewis*, 1 D. J. & S. 38, 49, *per* Lord Westbury; *Sharpe v. San Paulo Railway Co.*, 8 Ch. 598.

if the facts themselves do not establish it (*d*). It is otherwise in criminal proceedings against a person charged with fraud, for there the maxim applies, *Actus non facit reum nisi mens sit rea* (*e*). There must in such cases be an allegation of an intent to defraud (*f*).

If the facts alleged do not necessarily amount to a fraud, but only may amount to fraud, there should in civil proceedings be an averment of fraud (*g*).

It is not necessary to aver and prove fraud in order to obtain protection for a trade mark (*h*).

If the transaction sought to be impeached be between solicitor and client or principal and agent, the statement of claim should allege that the defendant was the solicitor or agent at the time of the transaction, if such be the ground on which relief is sought. If the case is not so stated in the pleadings, evidence to prove it cannot be admitted (*i*).

If a party seeks rescission of a contract, he need not aver that he can restore the property, this being presumed as a usual if not a necessary consequence when he applies to have the contract rescinded and everything placed *in statu quo* (*k*).

If a statement of claim charges notice, it is sufficient to do so generally, without averring facts as evidence of the charge. It is not, however, necessary to charge notice in a statement of claim to which a plea for valuable consideration without notice might be pleaded (*l*). An allegation that the defendant was aware, and had notice of, &c., is sufficiently specific to let in evidence that he had notice through his solicitor (*m*).

(*d*) *Ship v. Crosskill*, 10 Eq. 82 ;
Thom v. Bigland, 8 Exch. 725, per
Lord Wensleydale ; *Davey v. Garrett*,
7 Ch. D. 489.

(*e*) *Haycraft v. Creasy*, 2 East, 104,
per Lord Kenyon. See *Peck v.*
Gurney, 13 Eq. 113.

(*f*) *Queen v. Aspinall*, 2 Q. B. D.
56.

(*g*) *Darcy v. Garrett*, 7 Ch. D. 489,
per Thesiger, L. J. ; *Byrne v. Muzio*,
8 L. R. 1. 405.

(*h*) *Singer Machine Manufacturing*
Co. v. Wilson, 3 App. Ca. 391.

(*i*) *Williams v. Llewellyn*, 2 Y. &
J. 68. See *Montesquieu v. Sandys*,
18 Ves. 301.

(*k*) *I'ezzie v. Williams*, 8 How.
(Amer.), 158.

(*l*) *Hughes v. Garner*, 2 Y. & J.
328.

(*m*) *M' Mahon v. M' Elroy*, L. R. 5
Eq. 1.

When a party seeks to avoid the Statute of Limitations on the ground of fraud, the statement of claim should set forth specifically by distinct averments the particular acts which constitute the fraud, as well as the time when it was discovered, in order to enable the defendant to meet the fraud and the alleged time of its discovery, so that the Court may see whether by the exercise of ordinary diligence the discovery might not have been made before (*n*). Chap. VIII.

There may be a prayer in the statement of claim that certain transactions may be deemed fraudulent, and also an alternative prayer for relief upon the supposition of such transactions not being set aside for fraud (*o*).

It is not necessary that there should be an express prayer that a transaction should be set aside for fraud. A transaction will be set aside for fraud under the prayer for general relief (*p*).

If a judgment or order be obtained by fraud, the proper remedy is by original action, and not by applying to the Court for a rehearing (*q*).

Assignees of a bankrupt cannot at the hearing insist on a case of fraudulent preference, unless they have raised it in the pleadings (*r*).

When the same person has been induced to part with his property at an undervalue at two different times, through the misrepresentations of two different agents of the same principal, one action may be brought to set aside both transactions, although in themselves wholly distinct, and the same will not be demurrable for multifariousness (*s*).

A shareholder who seeks to be relieved from his shares on the ground of misrepresentation in the prospectus of the company, must allege specifically the particular misrepresenta-

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| <p>(<i>n</i>) <i>Stearns v. Page</i>, 7 How. (Amer.), 829; <i>Moore v. Greene</i>, 19 How. (Amer.), 71; <i>Beaubien v. Beaubien</i>, 23 How. (Amer.), 208; <i>Budger v. Budger</i>, 2 Wall. (Amer.), 95. See <i>Gilbs v. Guild</i>, 9 Q. B. D. 59, <i>infra</i>, p. 431.</p> | <p>(<i>p</i>) <i>Williams v. Smith</i>, 7 L. J. Ch. 129.</p> |
| <p>(<i>o</i>) <i>Bouren v. Evans</i>, 2 H. L. 280.</p> | <p>(<i>q</i>) <i>Flower v. Lloyd</i>, 6 Ch. D. 297.</p> |
| | <p>(<i>r</i>) <i>Holderness v. Rankin</i>, 2 D. F. & J. 258.</p> |
| | <p>(<i>s</i>) <i>Walsham v. Stainton</i>, 1 D. J. & S. 678.</p> |

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tion on which he relies, and must allege that he should not have applied for the shares except upon the faith of the representation which he asserts to be untrue (*t*). If a case of fraud is alleged in respect of the formation of a company, it must be set up by an action, and not by proceedings under the winding-up order (*u*).

If an application be made under s. 35 of the Companies Act, 1862, to strike off the list of shareholders a person improperly registered as a shareholder, and the application be made in the winding up, it ought to be made in the name of the company, and not in the name of the liquidator (*x*).

To support an action of deceit there must be the assertion of that which the party making it knew to be false. The *scienter* must be either expressly alleged, or there must be an allegation that is tantamount to the *scienter* of the fraudulent representation (*y*). The pleading is not necessarily bad by reason of the omission of the *scienter*. The averment that a representation made with the intent that it should be acted on was false, as the defendant had the means of knowing and ought to have known, is sufficient to maintain the action (*z*). As a general rule, however, in actions of deceit the plaintiff should aver that the representation of the defendant was false to his knowledge, that it was made under circumstances on which the plaintiff might reasonably rely, that the plaintiff acted in consequence of the defendant's false representation, and has suffered actual loss thereby (*a*). In actions of deceit, whether against a person or a company, the fraud of the agent may be treated, for the purpose of pleading, as that of the principal who is sought to be made answerable in the action (*b*).

Where the consideration has been obtained by means of a contract, although induced by fraud, the plaintiff cannot assert

(*t*) *McEwen v. West London Wharves, &c., Co.*, 40 L. J. Ch. 471.

(*u*) *Leifchild's Case*, 1 Eq. 231.

(*x*) *Kintrea's Case*, 5 Ch. 95.

(*y*) *Wilde v. Gibson*, 1 H. L. 633, per Lord Campbell.

(*z*) *Doyle v. Hort*, 4 L. R. 1. 668.

(*a*) *Hyde v. Bulmer*, 18 L. T. N. S. 293.

(*b*) *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 265; *Mackay v. Commercial Bank of New Brunswick*, ib. 5 P. C. 394.

any other contract than that in fact made. If he treats the transaction as a contract, he must take the contract altogether and be bound by the specified terms. He cannot avail himself of defendant's fraud so as to rescind the contract and substitute a new contract on different terms. But he may if he disaffirm the contract recover his property, or damages for the fraud as a substantive wrong (*c*). When, for example, a man has sold goods on credit, although he has been defrauded into selling them, he cannot by reason of the fraud sue for the price before the credit has expired, but he may treat the sale as a nullity and claim a return of the goods (*cc*). By suing for the price he affirms the contract. If he treats the contract as a fraud he should claim a return of the goods (*d*). If a contract is altogether rescinded there is no sale. The defrauding party is not a purchaser, but a person who has tortiously got possession of them (*e*). A plaintiff who comes to the Court with the contract as an existing contract cannot have the relief to which he would be entitled if the contract had been rescinded. He cannot recover the money, which, if the contract stands, is not repayable (*f*).

A defendant is not justified in omitting to demur to an Demurrer, action on the ground that it contains charges of fraud against him (*g*).

A general allegation of fraud is, on demurrer, a good answer to an alleged contract, although the pleading alleging the contract shows that the person defrauded took a special benefit under the contract (*h*).

The defence of fraud should be specially pleaded (*i*). A plea Plea, to an action on a contract by a defendant that he had been induced to enter into the contract by the fraudulent representa-

(*c*) *Ferguson v. Carrington*, 9 B. & C. 59; *Strutt v. Smith*, 1 Cr. M. & R. 312.

(*cc*) *Ib.*

(*d*) *Ib.*

(*e*) *Reed v. Hutchinson*, 3 Camp. 353; *Selway v. Fogg*, 5 M. & W. 86.

(*f*) *Cargill v. Bower*, 10 Ch. D.

517.

(*g*) *Nesbitt v. Berridge*, 11 W. R. 446, 1 N. R. 345.

(*h*) *Irlam v. Midland Railway Co.*, 23 W. R. 660.

(*i*) Reg. Gen. 8 T. T. 1852; Jud. Act, 1875, Ord. xix. 18.

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tions of the plaintiff, without averring that he had repudiated the contract by giving up the benefit under it, is bad. In *Deposit Life Assurance Co. v. Ayscough* (*k*), a plea in an action against a shareholder for calls was held bad, because it only averred that he was induced to become a shareholder by the fraud of the plaintiffs, and did not show that he had renounced the shares and the benefit to be derived under them. But a plea to an action by a company against a shareholder for calls that he was induced to become a shareholder by the fraud of the plaintiffs, that he had never recognised, since notice of the fraud, any rights or liabilities in himself as such shareholder, nor received any benefit from his shares, and that within a reasonable time after notice of the fraud he had repudiated his shares and given notice to the plaintiffs of his repudiation, is a good plea (*l*).

Under the rules of pleading, the plea of fraud imports an allegation that the defendant on discovering the fraud disaffirms the contract. But if the evidence shows or the jury find that the defendant has not disaffirmed the contract, the plea is bad, for only part of it is proved (*m*).

A defendant to an action on a contract, if he seeks for damages on the ground of fraud, must, in his counterclaim, plead knowledge on the part of the plaintiff that the allegations made by him were untrue (*n*).

Plea of acquiescence.

Where a defendant to an action relies upon the acquiescence of the plaintiff, he must aver that the plaintiff knew that the defendant was acting in reliance on the acquiescence of the plaintiff, or that the acts relied on were such as to induce a reasonable man to believe that the plaintiff had acquiesced (*o*).

Plea of Statute of Limitations.

If the defendant means seriously to rely upon the lapse of time as a substantial defence to the action, it should be specially averred in the pleadings (*p*).

(*k*) 6 E. & B. 761.(*l*) *Bulch & Plwm Lead Mining Co. v. Baynes*, L. R. 2 Exch. 324.(*m*) *Dawes v. Harness*, L. R. 10 C. P. 166.(*n*) *Redgrave v. Hurd*, 20 Ch. D. 1.(*o*) *Smith v. Hayes*, I. R. 1 C. L. 333.(*p*) *Lindsey Petroleum Co. v. Hurd*, L. R. 5 P. C. 221.

In an action to recover damages for fraudulent representations, a reply to a defence of the Statute of Limitations that the plaintiff did not discover and had not reasonable means of discovering the fraud within six years, and that the existence of such fraud was fraudulently concealed by the defendants, is a good replication (*q*). Chap. VIII.
Replication to
plea of Statute
of Limitations.

The defence of purchase for value without notice must be specifically alleged and proved by those who rely on it (*r*). Pleading purchase for value
without notice.

When a party relies upon the plea, he must, in his plea, aver expressly that the person who conveyed was seised, or pretended to be seised, when he executed the conveyance, and that he was in possession, if the conveyance purported an immediate transfer of the possession at the time when he executed the deed (*s*). It must aver the consideration (*t*), and actual payment of it. A consideration secured to be paid is not sufficient (*u*). The plea must also deny notice of the plaintiff's title or claim previous to the execution of the deeds and payment of the consideration (*x*); and the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title (*y*).

Notice must be denied whether it be charged in the bill or not (*z*). Notice must be denied by way of averment in the plea, otherwise the fact of notice will not be in issue (*a*). But it is sufficient to deny notice generally; for it is not the office of a plea to deny particular facts, unless they are specially charged as evidence of notice. If, however, particular facts are specially charged as evidence of notice, the plea must be accompanied by an answer denying the facts as specially and particu-

(*q*) *Gibbs v. Guild*, 9 Q. B. D. 59. & War. 31, Mitf. Plead. 320.

(*r*) *Philipps v. Philipps*, 4 D. F. & J. 209; *Att.-Gen. v. Biphosphated Guano Co.*, 11 Ch. D. 327. (*x*) *Moore v. Mayhow*, 1 Ch. Ca. 34; *Tourville v. Naish*, 3 P. Wms. 307, Mitf. Plead. 329.

(*s*) *Jackson v. Rowe*, 4 Russ. 514, Mitf. Plead. 320. See as to case where purchase is of a reversion, *Hughes v. Garth*, Amb. 421. (*y*) *Kelsall v. Bennett*, 1 Atk. 522, Mitf. Plead. 321.

(*t*) *Millard's Case*, 2 Freem. 43; *Wagstaff v. Read*, 2 Ch. Ca. 156. (*z*) *Aston v. Curzon*, 3 P. Wms. 244 (n.) f.; *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Hughes v. Garner*, 2 Y. & C. 328.

(*u*) *Hardingham v. Nicholls*, 3 Atk. 304; *Molony v. Kernan*, 2 Dr. 94, Mitf. Plead. 321. (*a*) *Harris v. Ingledew*, 3 P. Wms.

Chap. VIII. larly as they are charged in the bill, so that the plaintiff may be at liberty to except to its sufficiency (*b*).

If a purchaser without notice neglects to protect himself by plea, he may defend himself by answer (*c*), but if he submits to answer, he must answer fully, although he might by demurrer or plea have protected himself (*d*). A defendant, who puts in answer but does not set up the defence of purchase for value without notice, cannot afterwards insist on that defence (*e*).

- (*b*) *Pennington v. Beechey*, 2 Sim. 393.
 & St. 282; *Ocey v. Leighton*, ib. 234; (*c*) *Att.-Gen. v. Wilkins*, 17 Beav.
Hardman v. Ellames, 5 Sim. 650, 2 285, 291.
 M. & K. 732; *Kennedy v. Green*, 6 (*d*) *Lancaster v. Evors*, 1 Ph. 352.
 Sim. 7; *Lord Portarlington v. Soulby*, (*e*) *Philipps v. Philipps*, 4 D. F. &
 7 Sim. 23; *Gordon v. Shaw*, 14 Sim. J. 209.

CHAPTER IX.

PARTIES.

THE heir at law of a person seised in fee, may bring an action Chap. IX.
to set aside a transaction into which his ancestor has been Who may sue.
induced, by fraud, to enter (*a*). He is not precluded from suing
to set aside the sale, by the circumstance of the party defrauded
having, by will, bequeathed to a third party the balance of the
purchase money remaining due at his death (*b*). If, however,
the statement of claim alleges that the purchase money is
unpaid, the personal representatives must be made parties,
as being interested in maintaining the validity of the con-
tract (*c*).

The executor of a party defrauded may bring an action to
have a transaction set aside (*d*). So, also, may a devisee bring
an action to set aside a transaction which has been fraudulently
obtained from his testator. The heir at law is not a necessary
party (*e*).

So, also, may a remainderman, under a settlement, bring an
action to set aside a transaction, into which his predecessor in
title, under the settlement, has been induced by fraud to
enter (*f*). If fraud has been practised on a tenant in tail, and
has been carried into effect by barring the entail, and he dies

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| <p>(<i>a</i>) <i>Bellamy v. Sabine</i>, 2 Ph. 425 ;
 <i>Holman v. Loynes</i>, 4 D. M. & G. 270 ;
 <i>Gresley v. Mousley</i>, 4 D. & J. 78 ;
 <i>Clark v. Malpas</i>, 31 Beav. 88, 4 D.
 F. & J. 401 ; <i>Longmate v. Ledger</i>, 2
 Giff. 157.</p> | <p>(<i>d</i>) <i>Walsham v. Stainton</i>, 1 D. J.
 & S. 678.
 (<i>e</i>) <i>Uppington v. Bullen</i>, 2 Dr. &
 War. 184 ; <i>Harrison v. Guest</i>, 6 D.
 M. & G. 424.</p> |
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(*b*) *Bellamy v. Sabine*, 2 Ph. 425.

(*c*) *Wilkinson v. Fowkes*, 9 Ha.

- (*f*) *Ward v. Hartpole*, 3 Bligh,
490 ; *Brydges v. Branfill*, 12 Sim.
369.

without issue, and without confirming the transaction, the next remainderman may bring an action to set it aside; but not, if there were an independent intention to bar the entail, and the fraud applies only to some part of the transaction, distinct from that object (*g*).

If several persons have been induced, by false and fraudulent representations in the prospectus of a company to take shares in, or subscribe to, the company, each one may bring an action on his own behalf against the company and its directors for a rescission of the contract to take shares or for a return of the monies which he has advanced. It is not necessary that the other persons defrauded should be parties to the suit, or be represented therein (*h*). The case of each person who has been deceived by the misrepresentation is peculiar to himself and must depend on its own circumstances. Each person has a distinct and separate ground of relief. One of the parties, therefore, who have been defrauded cannot make himself properly the representative of the other shareholders and bring an action on their behalf as well as his own (*i*).

The general rule is that the company itself should be plaintiff in an action against the promoters and directors of the company to set aside a contract of sale or purchase upon the ground that it was obtained by means of fraudulent representations in the prospectus and for the recovery and repayment of the purchase money (*k*), but where the acts complained of are acts which a majority of the shareholders cannot sanction so as to bind the minority, and it is impossible through the improper conduct of the directors to get the company to impeach these acts, a shareholder may bring an action on behalf of himself and all the other shareholders (*l*).

If the directors of a company have misrepresented the state

(*g*) *Bellamy v. Sabine*, 2 Ph. 425.
See *Tarleton v. Liddell*, 17 Q. B. 390.

(*h*) *Central Railway Company of Venezuela*, 2 E. & I. App. Ca. 112;
Reese River Silver Mining Co. v. Smith, 64.

(*i*) *Hallows v. Fernie*, 3 Ch. 471.

(*k*) *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Ca. 1265;
Phosphate Sewage Co. v. Hartmont, 5 Ch. D. 394; *Duckett v. Gover*, 6 Ch. D. 83.

(*l*) *Mason v. Harris*, 11 Ch. D. 108.

of the company, the whole body of the shareholders cannot maintain an action to recover the money which they have lost from the directors; nor can the shareholders as a body, though the directors by misrepresenting the state of the company have caused larger dividends to be paid than ought to have been paid, make the directors liable to repay the dividends (*m*).

A suit may, however, be properly instituted by one or some of a number of partners, on behalf of himself, or themselves, and all others whose interest is identical with his or their own, when the object of the suit is to make an officer of the company account for a secret benefit or advantage obtained by him, in breach of the good faith owing to those whose affairs he conducts (*n*); or to rescind a contract into which the partnership has been induced to enter, by false and fraudulent representations (*o*).

The right to bring an action of deceit, or to have relief, on the ground of misrepresentation, is not confined to the person to whom the false representation has been made, but extends to third persons, provided it appear that the representation was made with the intent that it should be acted on by such third persons, or by the class of persons to whom they may be supposed to belong, in the manner that occasions the loss or injury (*p*). It is sufficient if the representation be made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby (*q*).

Where, accordingly, a representation was made to the

(*m*) *Turquand v. Marshall*, 4 Ch. 376.

(*n*) *Hichens v. Congreve*, 4 Russ. 562; *Taylor v. Salmon*, 4 M. & C. 134; *Benson v. Heathorn*, 1 Y. & C. C. C. 326; *Lund v. Blunshard*, 4 Ha. 9; *Beck v. Kantorowicz*, 3 K. & J. 230; *Attwood v. Merryweather*, 5 Eq. 464 n.

(*o*) *Attwood v. Merryweather*, ib. See *Small v. Attwood*, You. 407.

(*p*) *Barry v. Crosskey*, 2 J. & H. 1; *Peck v. Gurney*, 6 E. & I. App. Ca. 412.

(*q*) *Swift v. Winterbotham*, L. R. 8 Q. B. 253; *Richardson v. Silvester*, ib., 9 Q. B. 34. Comp. *Hosegood v. Bull*, 36 L. T. N. S. 618.

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plaintiff's father with a view to being acted on by the plaintiff, it was held that by acting on it the plaintiff had a right of redress (*r*). So, also, a party may make inquiry where such is the custom through his bankers (instead of personally) concerning the standing of a third person, and it is no objection to a claim for redress for a fraudulent answer given to the plaintiff's banker that the representation was not made to the plaintiff (*s*). So, also, where directors of a company put forth a prospectus containing false representations for the purpose of selling shares of the company, the false representations are deemed to have been made to all who read the prospectus and become purchasers of shares from the company in reliance upon the statements there made (*t*).

The right of an allottee of shares in a company who has been induced to apply for them on the faith of false and fraudulent statements contained in the prospectus, to bring an action of deceit against the directors does not extend to a purchaser of shares in the market, though he may have purchased the shares upon the faith of statements contained in the prospectus. The responsibility of directors who issue a prospectus for an intended company misrepresenting actual or material facts or concealing facts material to be known does not, as of course, follow the shares on their transfer from an allottee to a purchaser from him. In order that the purchaser should be enabled to maintain an action of deceit against the directors in respect of losses occasioned by his belief in the prospectus and his consequent purchase of shares, he must show some direct connection between them and himself in the communication of the prospectus and its influence upon his conduct in becoming a purchaser (*u*). There must be something to connect the directors making the representation with the purchaser as in *Scott v. Dixon* (*x*), by selling a report containing the misrepresentation complained of to a person who afterwards purchases shares upon

(*r*) *Langridge v. Levy*, 4 M. & W. 337.

(*s*) *Swift v. Winterbotham*, L. R. 8 Q. B. 244.

(*t*) *Barry v. Crosskey*, 2 J. & H. 21 ;

Peck v. Gurney, 6 E. & I. App. Ca. 378.

(*u*) *Peck v. Gurney*, 6 E. & I. App. Ca. 378.

(*x*) 29 L. J. Exch. 62 n.

the faith of it; or as suggested in *Gerhard v. Bates* (y), by Chap. IX.
delivering the fraudulent prospectus to a person who thereupon
became a purchaser of shares; or by making an allotment of
shares to a person who has been induced by the prospectus to
apply for such allotment (z).

A party partially interested in an estate may maintain an
action to set aside a conveyance of such interest fraudulently
obtained from him, without making the other persons interested
in the estate parties (a).

Applications under the Companies Act, 1862 (25 & 26 Vict. c.
89, s. 35) to have a name removed from the list of shareholders
must be made by the person aggrieved or any member of the
company or the company itself. When a winding-up order has
been made, the application must be made in the name of the
company and not of the liquidator (b).

It is a general rule that a Court of Justice will not interpose
actively in favour of a man who is *particeps criminis* in an Plaintiff
particeps
criminis.
illegal or fraudulent transaction (c). The Court will take the
objection as to the illegality of the transaction, even although
the defendant himself does not (d). Where both parties are
equally offenders against the law, the maxim, *potior est conditio*
possidentis, prevails, not because the defendant is more favoured,
where both are equally criminal, but because on the principle
of public policy the Court will not assist a plaintiff who has paid
over money or handed over property in pursuance of an illegal
or immoral contract to recover it back (e). If, accordingly, a
deed has been executed, or a conveyance made, to enable a
party to contravene the provisions of an Act of Parliament, no
suit in equity will lie to set aside the deed or recover the estate.
The party executing it cannot be heard to allege his own

(y) 2 E. & B. 476.

(z) *Peek v. Gurney*, 6 E. & I. App.
Ca. 398.

(a) *Henley v. Stone*, 3 Beav. 355.

(b) *Kintrea's Case*, 5 Ch. 95.

(c) *Cecil v. Butcher*, 2 J. & W. 572;

Doe v. Roberts, 2 B. & Ald. 369;
McKinnell v. Robinson, 3 M. & W.

439; *Barnard v. Sutton*, 7 Jur. 685,
per Lord Lyndhurst; *Williams v.*
Williams, 20 Ch. D. 659. See *Ayerst*
v. Jenkins, 16 Eq. 282.

(d) *Hamilton v. Ball*, 2 Ir. Eq.
191, 194.

(e) *Taylor v. Chester*, L. R. 4 Q. B.
312.

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fraudulent purpose. He is estopped from confining the operation of his deed within the limits of his intended fraud (*f*). In a case where a man, in order to give his brother a colourable qualification to kill game, conveyed some land to him, it was held that his widow could not avoid the conveyance in an action of ejectment against her by the brother (*g*). So, also, if a man, with a view of defeating his creditors, makes a conveyance of his real and personal estate to another, no suit is, in general, maintainable by him against that other for the recovery of the property (*h*). So, also, money paid in furtherance of a fraud or other unlawful purpose cannot be recovered back (*i*).

A distinction has been taken between cases where a deed executed, or a conveyance made, for an illegal purpose, has performed its office, and been accompanied by the completion of the purpose, and cases where the deed or conveyance has not been used for the purpose for which it was executed. In *Platamone v. Staple* (*k*), the Vice-Chancellor appears to have considered, that the circumstance of the purpose for which the deed was made not having been accomplished, made a material distinction (*l*). But the distinction does not seem sound. If a grantor, so far as he can, completes the transaction for an illegal purpose, and leaves it in the power of the grantee to make at his pleasure the illegal use of the instrument originally intended, he merits the consequences attached to the illegality of his act (*m*). It is difficult to see upon what principle it can be contended that a man, who intends to commit a fraud, shall not have relief if he succeed in his attempt, but shall be

(*f*) *Curtis v. Perry*, 6 Ves. 747; *Sutton*, 7 Jur. 685.

Brackenbury v. Brackenbury, 2 J. & W. 391; *Cecil v. Butcher*, ib. 572; *Groves v. Groves*, 3 Y. & J. 163. *Comp. Childers v. Childers*, 1 D. & J. 482; *Darics v. Otty*, 35 Beav. 208.

(*g*) *Doe v. Roberts*, 2 B. & Ald. 369. See *Phillpotts v. Phillpotts*, 10 C. B. 85; *Bouris v. Foster*, 2 H. & N. 785.

(*h*) *Nellis v. Clark*, 4 Hill. (Amer.), 426; *Ford v. Harrington*, 2 Smith (Amer.), 285. *Comp. Barnard v.*

(*i*) *Begbie v. Phosphate Sewage Company*, L. R. 10 Q. B. 499.

(*k*) *Coop*, 251.

(*l*) See *Barnard v. Sutton*, 7 Jur. 685.

(*m*) *Cecil v. Butcher*, 2 J. & W. 578; *Doe v. Roberts*, 2 B. & Ald. 369; *Roberts v. Roberts*, Dan. 143; *Groves v. Groves*, 3 Y. & J. 163. See *Brackenbury v. Brackenbury*, 2 J. & W. 391.

relieved if he fails or hesitates to proceed, because he fears a failure. His intention is as fraudulent in the one case as in the other (*n*).

A distinction has also been taken between cases where the conveyance has been made with the privity of, or the deed has been delivered to, the grantee, and cases where the conveyance has not been communicated to the grantee, nor the deed parted with by the grantor (*o*). But there is a preponderance of authority in support of the proposition that, although a voluntary deed is made without the knowledge of the grantee, and has been kept in the hands of the grantor, a Court of Equity will not relieve against it (*p*). In *Brackenburg v. Brackenburg* (*q*), the grantor had never parted with the possession of the deed, nor had it been used for the fraudulent purpose with a view to which it was executed. After the death of the grantor, the grantee obtained possession by deceit, and under a promise to return it immediately, yet the Court refused to relieve. Inasmuch as it is well established law that a man who executes a voluntary settlement passes the estate out of himself, though he retains the deed in his own possession (*r*), it is impossible to contend that the distinction attempted to be made is a sound one.

The rule that a Court of Justice will not actively interpose in favour of a man who is *particeps criminis* in an illegal or fraudulent transaction, like most other general rules, admits of exceptions. An exception to the rule takes place where the party seeking relief, although *particeps criminis*, is not *in pari delicto* with his associate in the matter. There may be, and often are, very different degrees of guilt of parties who concur in an illegal act. One party may act under circumstances of oppression, imposition, undue influence, of great inequality of age or condition, so that his guilt may be far less in degree than that of the other party (*s*).

(*n*) *Buteman v. Ramsay*, San. & Sc. 478.

(*o*) *Ward v. Lant*, Prec. Ch. 182 ;
Birch v. Blagrove, Amb. 264 ; *Groves v. Groves*, 3 Y. & J. 163.

(*p*) *Cecil v. Butcher*, 2 J. & W. 578.

(*q*) *Ib.* 391.

(*r*) *Roberts v. Williams*, 4 Ha. 130

(*s*) *Smith v. Bromley*, 2 Doug. 696 n.; *Bosanquet v. Dushwood*, Ca.

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Illegality resulting from pressure and illegality resulting from an attempt to stifle a prosecution, do not fall within that class of illegalities in which the Court stays its hand, but are of a class in which the Court will actively give its assistance in favour of the oppressed party, by directing monies to be repaid (*t*).

Other cases which form an exception to the general rule are cases where the act or deed in which the parties concur is against the principles of morality or public policy. In such cases there may be on the part of the Court itself a necessity of supporting the public interest or policy, however reprehensible the conduct of the parties themselves may be (*u*). Although, for instance, a Court of Equity will not relieve a man who assigns property to another with the view of defeating his creditors, the case is different if the person who assigns the property is a client, and the person to whom it has been assigned is his attorney. The rule of public policy which prohibits an attorney from obtaining any advantage in transactions must prevail, and the attorney must reconvey the property (*x*). So, also, the purchase of a bankrupt's estate secretly, by a person for the benefit of the solicitor to the assignees was set aside at the suit of the bankrupt, after his bankruptcy had been annulled, though there was evidence to show that the bankrupt had been privy to the transaction (*y*).

If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he wait till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action. The law will not allow that to be done. In permitting a man to recover before the illegal purpose is carried out, the law does not carry out the illegal transaction.

t. Talb. 41; *Browning v. Morris*, Cowp. 790; *Osborne v. Williams*, 18 Ves. 379; *Palmer v. Wheeler*, 2 Ba. & Be. 31; *Reynell v. Sprye*, 1 D. M. & G. 678, 679; *Bowes v. Foster*, 2 H. & N. 785.

(*t*) *Davies v. London & Provincial*

Marine Insurance Co., 8 Ch. D. 477.

(*u*) *Law v. Law*, Ca. t. Talb. 140; *St. John v. St. John*, 11 Ves. 535.

(*x*) *Ford v. Harrington*, 2 Smith (Amer.), 285.

(*y*) *Adams v. Swarder*, 2 D. J. & S. 44.

The effect is to put the parties in the same situation as they were in before the illegal transaction was determined upon and before the parties took any steps to carry it out (z). Chap. IX.

There is great difficulty in applying the maxim *potior est conditio possidentis* to a case where money has been placed *in medio*, and where the Court must do something with it or leave it to be locked up for ever (a).

When a party to an illegal or immoral contract comes himself to be relieved from that contract, or its obligations, he must distinctly and conclusively state such grounds of relief as the Court can legally attend to. He should not accompany his claims to relief, which may be legitimate, with claims and complaints, which are contaminated with the original immoral purpose (b). A distinction will be taken between cases where a party has actually accomplished the bad purpose to which a deed was auxiliary, and cases in which he had not participated in the bad purpose which it was the very object of the deed to procure (c). In *Sismey v. Eley* (d), where a plaintiff sought to be relieved from a deed by which he had agreed to pay an annuity to a woman, on the ground that the consideration for it was a promise made to him to live with him as his mistress, a demurrer to the bill was overruled, as it did not appear that the plaintiff had availed himself of the promise.

A distinction is taken in equity between enforcing illegal contracts, and asserting title to monies arising from an illegal contract. If the transaction alleged to be illegal is completed and closed, so that it will not be in any manner affected by what the Court is asked to do, the party to the transaction, who has possessed himself of the monies arising out of the transaction, cannot be permitted to set up the illegality of the transaction against the otherwise clear title of the other. One of two partners, or joint adventurers, therefore, who has possessed himself of the property, common to both, cannot be permitted to retain it, by merely showing that in realising it

(z) *Taylor v. Bowers*, 1 Q. B. D. 300.

(b) *Batty v. Chester*, 5 Beav. 103.

(c) *Smyth v. Griffin*, 13 Sim. 254 ;

(a) *Davies v. London & Provincial Marine Insurance Co.*, 8 Ch. D. 477.

Benyon v. Nettlefold, 17 Sim. 56.

(d) *Ib.* 1.

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some provisions in an Act of Parliament, or in the fiscal law of a foreign state, may have been violated (*e*). So, also, and upon a similar principle, if two trustees are equally guilty of a breach of trust, but one has received the monies, the other may maintain a bill against him to recover the amount (*f*).

In *Sykes v. Beadon* (*g*), however, Jessel, M. R., said he did not think the fact that an illegal transaction may be concluded was a ground for the interference of the Court. He said he was of opinion that no Court of Law or Equity would lend its assistance in any way towards carrying out an illegal contract: that such a contract cannot be enforced by one party to it against the other, either directly by asking the Court to carry it into effect or indirectly by claiming damages or compensation for breach of it: though there might be cases in which a party to such a contract might recover from a third person money paid over to that person in pursuance of the contract and other cases in which a person might recover from the parties to such a contract monies obtained by them from him on the representation that the contract was legal.

Parties
defendants.

In all cases of fraud the hand of the Court is not arrested by the death of the wrongdoer. An action survives against his executor when the wrong complained of has benefited the estate of the deceased (*h*). But if no benefit has accrued to the estate of the deceased from the wrong complained of, an action will not survive against his executor (*i*), unless in cases where the executor can be said to have taken the estate with the liability to make good his testator's representations out of it (*k*).

All persons who lend themselves to a fraud and receive money from the defrauded party may be made parties to an

(*e*) *Sharp v. Taylor*, 2 Ph. 801; *Shppard v. Oxenford*, 1 K. & J. 496; *McBlair v. Gibbs*, 17 How. (Amer.), 232. See also *Nash v. Ash*, 1 Eden. 378; *Mince v. Peters*, Harg. MSS. No. 112, p. 86; *Watts v. Brooks*, 3 Ves. 612; *Knowles v. Houghton*, 11 Ves. 168.

(*f*) *Baynard v. Woolley*, 20 Beav. 583.

(*g*) 11 Ch. D. 170.

(*h*) *Rawlins v. Wickham*, 3 D. & J. 304; *Gresley v. Mousley*, 4 D. & J. 78; *Walsham v. Stainton*, 1 D. J. & S. 690; *New Sombbrero Phosphate Co. v. Erlanger*, 5 Ch. D. 74.

(*i*) *Peek v. Gurney*, 6 E. & I. App. Ca. 392.

(*k*) *Ingram v. Thorpe*, 7 Ha. 67.

action to set aside the transaction, and to recover the monies which they have received. If trustees lend themselves to a fraud, by their *cestui que trust*, the liability is a joint and several one of all the accomplices (*l*). If third parties have aided the directors of a company in misapplying the funds of the company, an action against them and the directors is not multifarious (*m*). So, also, a man who has been guilty of a fraud, in concert with one of several trustees, may be joined in an action against the trustees generally (*n*).

All persons concerned in the commission of a fraud are to be treated as principals: no person can be permitted to excuse himself as the agent or servant of another (*o*). If an agent in the course of his employment commits a fraud upon another party, whereby damage ensues to the party injured, he will be liable to the party injured, though his principal would be so likewise (*p*).

The right of action is given to the party injured by the fraud against all persons who have joined in committing it, although the concurrence of some of these persons might be unknown to the party injured at the time of the injury (*q*).

If a man has abetted a fraud, the absence of a personal benefit resulting from it is no excuse; he may be justly made responsible for its results, and even if no other relief can be had against him, he may be compelled to pay the costs of the action (*r*). Solicitors or attornies who have abetted their clients in a fraud, or have prepared deeds to carry it out, may be made parties to an action to set aside the fraudulent transaction, and are liable to pay the costs, even though they may have derived no personal benefit therefrom (*s*).

(*l*) *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 456.

(*m*) *Lund v. Blanshard*, 4 Ha. 9.

(*n*) *Att.-Gen. v. Cradock*, 3 M. & C. 85.

(*o*) *Cullen v. Thompson's Trustees*, 4 Macq. 424, *per* Lord Westbury.

(*p*) *Weir v. Bell*, 3 Exch. D. 248, *per* Cockburn, C. J.

(*q*) *Cullen v. Thompson's Trustees*,

4 Macq. 432.

(*r*) *Seddon v. Connell*, 10 Sim. 85; *Clark v. Girdwood*, 7 Ch. D. 18.

(*s*) *Bowles v. Stewart*, 1 Sch. & Lef. 227; *Beadles v. Burch*, 10 Sim. 332; *Berry v. Armitstead*, 2 Keen, 227; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 444. See *Cory v. Eyre*, 1 D. J. & S. 167.

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A solicitor, who is implicated in a case of fraud, may be made a party to an action seeking relief in respect of that fraud, merely for the purposes of discovery, the only relief asked being that he should be ordered to pay costs (*u*). The case, of course, is all the stronger, if the solicitor has gained a personal benefit from a transaction into which he has induced his client to enter (*x*).

In an action, however, founded on alleged misrepresentation, it is improper to make as party to the action an attorney, agent, or arbitrator who has taken no active part in making the statement out of which the action arises, and who has been connected with it in such a way as to have made no profit out of it, merely with a view to making him liable for costs in case the principal defendant should fail (*y*).

Where the object of the action is not to set aside the transaction but to recover profits unfairly made by persons in a fiduciary character, a solicitor *quâ* solicitor who has not shared in the profits is not a proper party (*z*). Nor is a solicitor who has drawn up an instrument which is set aside or rectified on the ground of fraud, a proper party to the action, if he has only committed a blunder in the matter and not abetted the fraud (*a*).

A person filling a position of a fiduciary character, as an agent, is liable for a breach of duty, though he may have derived no benefit from it. Where two agents concur in a fraud, and one of them only derives benefit from the fraud, the other is also liable in equity for the benefit so derived (*aa*). Those who having a duty to perform, represent to others, who are interested in the performance of it, that it has been per-

(*u*) *Gilbert v. Lewis*, 1 D. J. & S. 52; *Slator v. Nolin*, 1 R. 11 Eq. 407.

(*x*) *Bennett v. Vaile*, 2 Atk. 327; *Proctor v. Robinson*, 35 Beav. 335. See *Brent v. Brent*, 10 L. J. Ch. 84.

(*y*) *Mathias v. Yetts*, 46 L. T. N. S. 497; comp. *Heatley v. Newton*, 19 Ch. D. 326, where an auctioneer was

held to be rightly made a party.

(*z*) *Bagnal v. Carlton*, 6 Ch. D. 372.

(*a*) *Clark v. Girdwood*, 7 Ch. D. 18.

(*aa*) *Walsham v. Stainton*, 1 D. J. & S. 678. See *Peek v. Gurney*, 6 E. & I. App. Ca. 393.

formed, make themselves responsible for all the consequences of the non-performance (*b*). Chap. IX.

If a man has been induced by the false representations, or fraud, of a particular shareholder in a company to purchase shares, the only necessary party to a bill filed for the return of the purchase-money, and for an indemnity, is the person who sold the shares (*c*).

It is not necessary that all the parties charged with fraud should be made parties (*d*). Where there are several partners, some of whom have committed fraud, any of the persons jointly and severally liable may be sued without making the others parties (*e*).

A man who has released the principal actor in a fraud, cannot go on against the other parties who would have been liable only in a secondary degree (*f*).

In a suit to set aside a settlement of real and personal estate for fraud, or undue influence on the part of the trustees, one or more of the parties beneficially interested is or are necessary parties (*g*).

A partner, being liable for the fraud of his co-partner, when acting within the proper scope of the partnership business, a firm of bankers or solicitors is liable for fraud practised upon a client by a member of the firm (*h*). The client, or principal, is entitled to relief against the other partners, not only if the case is one in which he might have recovered against such other partners, but also if the remedy at law against the other partners is barred by lapse of time (*i*). The original liability of one partner for the fraud of a co-partner is continued as well after as before the dissolution of the partnership (*k*). A fraud, however, committed by a partner whilst acting on his own separate

(*b*) *Blair v. Bromley*, 2 Ph. 360.

(*g*) *Read v. Prest*, 1 K. & J. 183.

(*c*) *Stainbank v. Fernley*, 9 Sim.

(*h*) *Brydges v. Branfill*, 12 Sim.

556; *Mare v. Malachy*, 1 M. & C.

369; *Sadler v. Lee*, 6 Beav. 330;

559; *Turner v. Hill*, 11 Sim. 1.

Blair v. Bromley, 5 Ha. 542, 2 Ph.

(*d*) *Seddon v. Connell*, 10 Sim. 79.

354; *St. Aubyn v. Smart*, 3 Ch. 646.

(*e*) *Plumer v. Gregory*, 18 Eq. 627.

(*i*) *Blair v. Bromley*, 2 Ph. 354.

(*f*) *Thompson v. Harrison*, 2 Bro.

(*k*) 1b.

C. C. 164, 1 Cox, 346.

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account, is not imputable to the firm, although, had he not been connected with it, he might not have been in a position to commit the fraud (*l*).

But if the firm has derived benefit from the fraudulent transaction, the other partners are jointly and severally liable with the partner who has committed the fraud to make good the money which has been fraudulently received by the firm, though the other partners have not committed any violation of duty (*m*).

Inasmuch as one partner has no authority to bind the other partners by borrowing money, unless it is borrowed in the usual course of business and for business purposes, if a client advances money to one of a firm of solicitors on the representation that it was to be lent to a client, and the solicitor fraudulently appropriates the money, his partner, if he had no knowledge of the fraud, is not liable to make it good, for it is not the business of a solicitor to act as a scrivener (*n*). The case however would be different, if the firm were employed to prepare securities. In such case a payment to one of the partners would have been a payment to the partnership firm, because it would then have been received for the purpose of being invested in a specific security; and until the matter is brought to an agreement to invest the money on a specific security, it does not come within the ordinary business of the partnership (*o*).

Where a syndicate has been formed for promoting a company and fraud has been practised in the matter, the members of the syndicate are jointly and severally liable (*p*). The estate of a deceased member of the syndicate is liable to the extent that it may have been benefited by the fraud (*q*).

The infancy of the defrauding party will not exempt him, for

(*l*) *Ex parte Eyre*, 1 Ph. 227 ;
Coomer v. Bromley, 5. Deg. & Sm.
 532 ; *Bishop v. Countess of Jersey*, 2
 Drew. 143.

(*m*) *Imperial Mercantile Credit
 Association v. Coleman*, 6 E. & I.
 App. Ca. 189.

(*n*) *Plumer v. Gregory*, 18 Eq. 621.

(*o*) *Ib*.

(*p*) *New Sombrero Phosphate Co.
 v. Erlanger*, 5 Ch. D. 74 ; *Phosphate
 Sewage Co. v. Hartmont*, *ib*. 394.

(*q*) *New Sombrero Phosphate Co. v.
 Erlanger*, *ib*. 74 ; *Peck v. Gurney*, 6
 E. & I. App. Ca. 377.

though the law protects him from binding himself by contract, it gives him no authority to cheat others (*r*).

A bankrupt is not a proper party to an action brought by the trustee under his bankruptcy to set aside a conveyance executed by the bankrupt with intent to delay or defeat his creditors (*s*).

An action which may have been brought for the purpose of setting aside a transaction on the ground of fraud, will not fail, merely because the bill may have incorrectly and untruly alleged a third person to have been a participator and joint actor in the fraud, although such incorrect mode of stating the case may affect the costs (*t*).

(*r*) *Evroy v. Nicholas*, 2 Eq. Ca. 678.

Ab. 488 ; *Cory v. Gertcken*, 2 Madd (s) *Weise v. Wardle*, 19 Eq. 171.
40 ; *Overton v. Bannister*, 3 Ha. 503 ; (t) *Reynell v. Sprye*, 1 D. M. & G.
Stikeman v. Dawson, 1 Deg. & Sm. 684.
90 ; *Lempriere v. Lange*, 12 Ch. D.

CHAPTER X.

PROOF.

Chap. X.

A MAN who alleges fraud must clearly and distinctly prove the fraud he alleges. The *onus probandi* is upon him to prove his case as it is alleged in the statement of claim (*a*). If he complains of fraud in the prospectus of a company, it is for him to prove that it was false, and false to the knowledge of the defendant, or at all events that he did not believe it, and it is for him to prove that he was misled (*b*). If the fraud is not strictly and clearly proved, as it is alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings (*c*). Fraud will not be carried by way of relief one tittle beyond the manner in which it is proved to the satisfaction of the Court (*d*). When a man seeks to charge another with fraud, he cannot succeed by proving that he understood the statement in a sense in which the other did not, and that in the sense in which he understood what the other said it was false (*e*). If a case of actual fraud is alleged, relief cannot be had by proving only a case of constructive fraud (*f*). But where material allegations of fraud are proved, the plaintiff will obtain relief, though other allegations are not proved (*g*).

(*a*) *Bellamy v. Sabine*, 2 Ph. 425, 448; *Blair v. Bromley*, 5 Ha. 559; *Jennings v. Broughton*, 17 Beav. 239; *Smith v. Kay*, 7 H. L. 750; *Hallows v. Fernie*, 3 Ch. 478; *Moxon v. Payne*, 8 Ch. 881; *Craig v. Philipps*, 3 Ch. D. 733.

(*b*) *Smith v. Chadwick*, 20 Ch. D. 76, *per* Lindley, L. J.; *Blake v. Albion Life Insurance Society*, 4 C.

P. D. 99.

(*c*) *Mowatt v. Blake*, 31 L. T. 387.

(*d*) *Luff v. Lord*, 11 Jur. N. S. 50, 52, *per* Lord Westbury.

(*e*) *Smith v. Chadwick*, 20 Ch. D. 79.

(*f*) *Parr v. Jewell*, 1 K. & J. 671; *Wilde v. Gibson*, 1 H. L. 605.

(*g*) *Moxon v. Payne*, 8 Ch. 881.

If the statement of claim alleges a case of fraud, and the title to relief rests upon that fraud only, the action will be dismissed, if the fraud as alleged is not proved. It cannot be allowed to be used for any secondary purpose. But if the case does not entirely rest upon the proof of fraud, but rests also upon other matters, which are sufficient to give the Court jurisdiction, and are separable from the case of fraud, and the case of fraud is not proved, but the other matters are proved, relief will be given in respect of so much of the statement of claim as is proved (*h*).

If the defendant alleges that a contract sued on was obtained from him by fraud, the burden of proving the fraud lies on him (*i*). So, also, if fraud is established against a party, it is for him, if he alleges acquiescence in the other party, to show when the latter acquired a knowledge of the truth and prove that he knowingly forbore to assert his rights (*k*). So, also, where a man makes a false representation to another, the *onus probandi* is on him to show that the other party waived it and relied on his own knowledge (*l*).

The rules of evidence are the same in equity as at law (*m*).^{Evidence} Whether certain facts, as proved, amount to a fraud, is a question for the Court as well at law as in equity. The facts to constitute a fraud must be proved at law by the jury (*n*). In equity they are found by the Court; but a Court of Equity is not justified in finding such facts upon any less or different kind of proof than would be required to satisfy a jury. The law in no case presumes fraud. The presumption is always in favour of innocence, and not of guilt. In no doubtful matter

(*h*) *Glascott v. Lung*, 2 Ph. 310; *Wilde v. Gibson*, 1 H. L. 607; *Archbold v. Commissioners of Charitable Bequests*, 2 H. L. 440; *Price v. Berrington*, 3 Mac. & G. 486; *Billage v. Southey*, 9 Ha. 535; *Espey v. Lake*, 10 Ha. 260; *Baker v. Bradley*, 7 D. M. & G. 597; *Traill v. Baring*, 4 D. J. & S. 331; *Hickson v. Lombard*, 1 E. & I. App. Ca. 324; *Hilliard v. Eiffe*, 7 E. & I. App. Ca. 39; *Chartered Bank of Australia v. Lempriere*,

L. R. 4 P. C. 597; *Thomson v. Eastwood*, 2 App. Ca. 236.

(*i*) *Beatty v. Fishel*, 4 Browne (Amer.), 448.

(*k*) *Lindsey Petroleum Co. v. Hurd*, L. R. 5 P. C. 221.

(*l*) *Redgrave v. Hurd*, 20 Ch. D. 13.

(*m*) *Manning v. Lechmere*, 1 Atk. 453; *Man v. Ward*, 2 Atk. 229; *Glyn v. Bank of England*, 2 Ves. 41.

(*n*) *Murray v. Mann*, 6 Exch. 539.

does the Court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established (*o*). Circumstances of mere suspicion will not warrant the conclusion of fraud (*p*). The proof must be such as to create belief, and not merely suspicion. If the case made out is consistent with fair dealing and honesty, a charge of fraud fails (*q*).

It is not, however, necessary, in order to establish fraud, that direct affirmative or positive proof of fraud be given (*r*). Circumstantial evidence is not only sufficient, but in many cases it is the only proof that can be adduced. In matters that regard the conduct of men the certainty of mathematical demonstration cannot be expected or required. Like much of human knowledge on all subjects, fraud may be inferred from facts that are established. Care must be taken not to draw the conclusion hastily from premises that will not warrant it; but a rational belief should not be discarded because it is not conclusively made out. If the facts established afford a sufficient and reasonable ground for drawing the inference of fraud, the conclusion to which the proof tends must, in the absence of explanation, or contradiction, be adopted (*s*). It is enough if from the conduct of a party the Court is satisfied that it can draw a reasonable inference of fraud (*t*), or if facts be established, from which it would be impossible, upon a fair and reasonable

(*o*) *Bowen v. Evans*, 2 H. L. 257; 401; *Pares v. Pares*, 33 L. J. Ch. 218.
Pike v. Figers, 2 Dr. & Wal. 267;

McCormick v. Grogan, 4 E. & I. App. Ca. 97.

(*p*) *Trenchard v. Wanley*, 2 P. Wms. 166; *Bath and Montagu's Case*, 3 Ch. Ca. 114; *Townsend v. Lowfield*, 1 Ves. 35, 3 Atk. 536; *McQueen v. Farquhar*, 11 Ves. 467; *Walker v. Symonds*, 3 Sw. 61; *Hamilton v. Kirwan*, 2 J. & L. 401; *Parfit v. Lawless*, 2 Pr. & Div. 471; *McCormick v. Grogan*, 4 E. & I. App. Ca. 97.

(*q*) *Hamilton v. Kirwan*, 2 J. & L.

(*r*) *Llewellyn v. Mackworth*, 2 Atk. 40; *Villiers v. Villiers*, ib. 71; *Man v. Ward*, ib. 229; *East India Co. v. Donald*, 9 Ves. 282; *Stikeman v. Dawson*, 1 Deg. & Sm. 105; *Pickles v. Pickles*, 9 W. R. 397, 31 L. J. Ch. 146.

(*s*) *Rex v. Burdett*, 4 B. & Ald. 161, 162; *Stikeman v. Dawson*, 1 Deg. & Sm. 105; *Humphrey v. Oliver*, 28 L. J. Ch. 406; *Parfit v. Lawless*, 2 Pr. & Div. 472.

(*t*) 10 Ch. 530, *per* Mellish, L. J.

conclusion, to conclude but that there must have been fraud (*u*). Fraud may be proved from the acts and conduct of a party as well as from his written declaration (*x*). The motives with which an act is done may be, and often are, ascertained and determined by circumstances connected with the transaction, and the parties to it. Various facts and circumstances evince sometimes with unerring certainty the hidden purposes of the mind (*y*). "A deduction of fraud," says Kent (*z*), "may be made, not only from deceptive assertions and false representations, but from facts, incidents, and circumstances, which may be trivial in themselves, but may, in a given case, be often decisive of a fraudulent design" (*a*).

Evidence of similar frauds on the part of the defendant committed on other parties in the same manner are admissible in evidence, if they tend to prove the motive or intention which actuated the defendant in the transaction under investigation. In a vast number of cases such evidence is the only means of establishing fraud. Many fraudulent transactions are apparently fair until the fraud is shown by proving virtually what has happened—the real facts underlying the evident ones—and one great element of fraud is the intent of the parties. Intent, motive, design, complicity, together with other acts, may show fraud. If evidence of this kind were inadmissible, fraud would frequently never be proved. It is no doubt true that in order to prove that A. has committed fraud on B., it is neither sufficient nor relevant to prove that A. has committed fraud on C. D., and E. But the case is different, if it can be shown that the fraud on B. is one of a class of other transactions, having common features, the features being the false pretence and the knowledge of that false pretence on the part of the defendant (*b*).

In an action against a vendor for misrepresentation in the sale of goods, if it is shown that a material representation has

(*u*) *Pickles v. Pickles*, 9 W. R. 397, 10 Smith (Amer.), 141.
31 L. J. Ch. 146; *Re Marsden's Trust*, (z) 2 Comm. p. 484.
4 Drew. 599.

(*x*) *Walters v. Morgan*, 3 D. F. & Wm. 205; *Bennett v. Vule*, 9 Mod. 315; *Owen v. Homan*, 4 H. L. 1033.
J. 718.

(*y*) *Nichols v. Pinner*, 4 Smith (Amer.), 295; *Hennequin v. Naylor*, (*b*) *Blake v. Albion Life Assurance Society*, 4 C. P. D. 101, 103.

been made by the vendor to induce the purchaser to buy, and that such representation is not true in fact, and it is proved that it was not true to the vendor's knowledge, the question cannot be asked him as to whether he did or did not entertain some other belief as to its truth, as the Court cannot enter into any question as to the state of a man's mind when the representation was made (*c*).

Where the fraud on a vendor is effected by means of assurances given by a third person of the buyer's solvency and ability to pay, the proof that such assurances were made must be in writing (*d*).

Burden of proof
may be shifted.

Though the proof of fraud rests on the party who alleges it, circumstances may exist to shift the burden of proof from the party impeaching a transaction on the party upholding it. If the evidence establishes a *prima facie* case of fraud, or shows that an instrument is false in any material part, the burden of showing that the transaction was fair lies upon the party who seeks to uphold it (*e*). If, for example, it appear that the donee of a power of appointment had at any time before the exercise of the power, the intention to derive a personal benefit from its exercise, or to make an appointment in fraud of the power, the burden rests on those who support the appointment to show that the intention had been abandoned at the time of the execution of the appointment (*f*). So, also, where conditions of sale are misleading, the *onus* is on the vendor to show not only that the purchaser had the means of information, but that he relied on his own information or judgment and was not in fact misled by the misrepresentation (*g*). So, also, where within a few months after making a voluntary settlement the settlor calls a meeting of his creditors and lays before them a statement showing himself to be insolvent, the burden is on him to show solvency at the

(*c*) *Hine v. Campion*, 7 Ch. D. 344,
per Jessel, M. R.

(*d*) *Haslock v. Ferguson*, 7 A. & E.
86.

(*e*) *Watt v. Grove*, 2 Sch. & Lef.
502; *Prince of Wales Assurance Co.*
v. Palmer, 25 Beav. 605; *Russell v.*
Jackson, 10 Ha. 213; *Cottam v.*

Eastern Counties Railway Co., 1 J. &
H. 243; *Dowle v. Saunders*, 2 H. &
M. 250; *Prees v. Coke*, 6 Ch. 648.

(*f*) *Humphrey v. Oliver*, 28 L. J.
Ch. 406; *Topham v. Duke of Port-*
land, 5 Ch. 61; *Bainbrigge v. Browne*,
18 Ch. D. 188.

(*g*) *Torrance v. Bolton*, 8 Ch. 118.

date of the settlement (*h*). So, also, if a man fraudulently mingles monies belonging to another with monies of his own, it lies on him to sever the portion which is affected by the fraud from that which is not affected by the fraud (*i*). Upon the same principle, if it appear that a fiduciary, or confidential relation exist between the parties to a transaction (*k*), or if it be established by evidence that one of the parties possessed a power of influence over the other (*l*), or was in a position to exercise dominion over the other (*m*), the burden of proof lies upon the party filling the position of active confidence, or possessing the power of influence, or dominion, as the case may be, to establish, beyond all reasonable doubt, the perfect fairness and honesty of the transaction. He is bound to preserve the evidence to show that all was rightly done (*n*). Parol evidence is admissible in such cases to prove the fairness of the transaction, but it is to be received and weighed with the most scrupulous accuracy, and to be dealt with as having its weight affected by the circumstances under which the parties stood (*nn*). If an agent for sale purchases the estate, or an interest in the estate, that he is employed to sell, the burden of proving that a full disclosure was made to his principal of the exact nature of his interest lies on him, and is not discharged merely by swearing that he did so if his evidence is contradicted by the principal, and is not corroborated (*o*). So, also, and upon the same principle, those who take a benefit under a will, and have been instrumental in preparing and obtaining it have thrown upon them the burden of showing the righteousness of the transaction (*p*). So, also, a

(*h*) *Crossley v. Elworthy*, 12 Eq. 158; *Mackay v. Douglas*, 14 Eq. 106. (*brigge v. Browne*, 18 Ch. D. 188, *supra*, pp. 158, 164.

(*i*) *Russell v. Jackson*, 10 Ha. 213. (*m*) *Lord Aylesford v. Morris*, 8 Ch. 498; *O'Rorke v. Bolingbroke*, 2 App. Ca. 834.

(*k*) *Gibson v. Jeyes*, 6 Ves. 278; *Benson v. Heathorn*, 1 Y. & C. C. C. 340; *Alfrey v. Alfrey*, 1 Mac. & G. 99; *Billage v. Southee*, 9 Ha. 540; *Moore v. Prance*, *ib.* 303, *supra*, pp. 126, 129. (*n*) *King v. Anderson*, I. R. 8 Eq. 637.

(*l*) *Cooke v. Lamotte*, 15 Beav. 240; *Kay v. Smith*, 7 H. L. 750; *Topham v. Duke of Portland*, 5 Ch. 61; *Bain-* (*nn*) *Re Holmes's Estate*, 3 Giff. 347; *Walker v. Smith*, 29 Beav. 394.

(*o*) *Dunne v. English*, 18 Eq. 524. (*p*) *Fulton v. Andrew*, 7 E. & I. App. Ca. 449, *supra*, pp. 294, 296.

man who takes advantage of a deed of gift or voluntary settlement, and sets it up against the donor or author of the settlement must, as a general rule, be able to show that the donor or author thoroughly understood the contents of the deed, knew what he was doing, or at all events was protected by independent advice, and was not acting under the pressure of undue influence. If there are any unusual provisions in the deed, he must be able to show that they were brought to the notice of and were understood and approved of by the donor or author of the settlement (*q*). If, for example, the gift be not subject to a power of revocation, the party taking the benefit may have thrown upon him the burden of proving that the donor meant the gift to be irrevocable (*r*). But where a voluntary deed is impeached, the *onus* of supporting it does not necessarily rest upon those who set it up. A man of full age and sound mind, who has executed a voluntary deed by which he has denuded himself of his property is bound by his own act, and if he comes to have the deed set aside, he must prove some substantial reason why it should be set aside (*s*).

The Court will not act upon the ignorance of a deed by a person who can read and write, but requires evidence of a contrivance in the opposite party to have the instrument drawn wrong and keep the matter in the dark (*t*). The presumption, however, that a person who can read knows the contents of an instrument which he executes only stands until proof of the contrary is proved (*u*).

Where a party to a deed undertakes to read a deed to the other party it is a fraud if he does not read it correctly. It is immaterial that the other party to the deed is capable of reading (*x*).

When a party is under the obligation of showing that an un-

(*q*) *Philipps v. Mullings*, 7 Ch. 7 Ch. 75, *supra*, p. 11.

246; *Turner v. Collins*, ib. 329.

(*u*) *Harris v. Delaware*, 3 Ired.

(*r*) *Wollaston v. Tribe*, 9 Eq. 44.

(Amer.), 213.

(*s*) *Henry v. Armstrong*, 18 Ch. D. 668

(*x*) *Stamps v. Bracy*, 1 How. (Miss.) Amer. 212. See *Thoroughgood's*

(*t*) *Michael v. Michael*, 4 Ired. (Amer.), 349. See *Hunter v. Walters*,

Case, 2 Co. Rep. 9 b., *supra*, p. 10.

professional person understood the contents of a deed or instrument which he executed, the mere proof of its having been read over to him unaccompanied with proper explanations, is not sufficient to satisfy the Court that the person hearing it read understood it (*y*). It must be proved by those who claim under it, upon satisfactory evidence, that the nature, effect, and contents of the deed were explained to and perfectly understood by him (*z*). It is not sufficient for a solicitor who is employed to prepare a marriage settlement for a lady whose property is the subject of it to say in general terms that he explained it to her. He ought to say what was the explanation he gave, and what was the meaning and effect of the limitations as stated by him to her (*a*).

The intervention of an independent third party, or adviser, is an important ingredient in showing the fairness of a transaction (*b*). If a solicitor be employed, there is always strong *prima facie* evidence that the party for whom he was acting knew the nature of the transaction (*c*): in all cases, indeed, where an independent legal adviser or solicitor is employed, the evidence that everything which was necessary to be known had been brought to the knowledge of his employer, would be conclusive (*d*). The intervention, however, of another solicitor or adviser, who, with the knowledge of the other party to the transaction, a former solicitor of his employer, neglects, or does not properly discharge his duty, is not sufficient to support a transaction between them (*e*). Nor is the intervention of a solicitor sufficient to support a transaction, if that one of the

(*y*) *Hoghton v. Houghton*, 15 Beav. 311; *Moore v. Prance*, 9 Ha. 304. See *Sharp v. Leach*, 31 Beav. 503; *Toker v. Toker*, 3 D. J. & S. 487; *Fulton v. Andrew*, 7 E. & I. App. Ca. 449.
(*z*) *Moore v. Prance*, 9 Ha. 304; *Anderson v. Ellsworth*, 3 Giff. 154; *Davies v. Davies*, 4 Giff. 417; *Toker v. Toker*, 3 D. J. & S. 487; *Hall v. Hall*, 8 Ch. 430.

(*a*) *Maunsell v. Maunsell*, 1 L. R. I. 549.
(*b*) *Cooke v. Lamotte*, 15 Beav. 240; *Bainbrigge v. Browne*, 18 Ch. D. 188.
(*c*) *Denton v. Donner*, 23 Beav. 291; *Miller v. Cook*, 10 Eq. 641.
(*d*) *De Montmorency v. Devereux*, 7 Cl. & Fin. 188.
(*e*) *Gibbs v. Daniel*, 4 Giff. 1.

Chap. X.

Admission of
extrinsic evi-
dence to avoid
a deed.

parties for whom the solicitor is acting is under the influence of (*f*), or for the interests of the other party (*g*).

A party is not estopped from avoiding his deed, by proving that it was executed for a fraudulent, illegal, or immoral purpose (*h*). Notwithstanding the solemnity and force which the law ascribes to deeds, and all the strictness with which it in general prohibits the introduction of extrinsic evidence, to prove that an instrument goes beyond, or does not fully contain, or incorrectly exhibits, the terms of the contract, which it was written and signed for the purpose of expressing and recording; the rule is settled, and not merely in Courts of Equity, that a deed, on its face just and righteous, may be vitiated and avoided, by alleging and adducing extrinsic evidence to prove that it was founded on a consideration, or had a view or purpose contrary to law or public policy (*i*). Although a party may thus, in certain cases, be enabled to take advantage of his own wrong (*k*), this evil is of a trifling nature in comparison with the flagrant evasions that would, in many cases, result from the adoption of a different rule (*l*).

If a person be induced by fraudulent statements to enter into a written contract, it is competent for him to prove fraud by evidence *aliunde*, although the written contract, or the deed of conveyance, is silent on the subject to which the fraudulent representation refers (*m*). So, also, fraud, whether in a record, or deed, or writing under seal, may be proved by parol evidence (*n*).

(*f*) *Moxon v. Payne*, 8 Ch. 881.

(*g*) *Slator v. Nolan*, I. R. 11 Eq. 407.

(*h*) *Collins v. Bluntern*, 2 Wils. 341, 1 Smith, L. C. 387; *Paxton v. Popham*, 9 East, 421; *Gas Light and Coke Co. v. Turner*, 5 Bing. N. C. 666, 6 Bing. N. C. 324; *Stratford and Moreton Railway Co. v. Stratton*, 2 B. & Ad. 518; *Hill v. Manchester Waterworks Co.*, ib. 552, 553; *Doe v. Howells*, ib. 747; *Benyon v. Nettelfold*, 17 Sim. 56, 3 Mac. & G. 94; *Horton v. Westminster Improvement Commissioners*, 7 Exch. 780.

(*i*) *Reynull v. Sprye*, 1 D. M. & G.

672, per Knight Bruce, L. J.

(*k*) *Doe v. Ford*, 3 A. & E. 654;

Doe v. Howells, 2 B. & Ad. 747.

(*l*) *Benyon v. Nettelfold*, 3 Mac. & G. 102. See *Mallalieu v. Hodgson*, 16 Q. B. 689; *Bowes v. Foster*, 2 H. & N. 779.

(*m*) *Dobell v. Stevens*, 3 B. & C. 623; *Wright v. Crookes*, 1 Sc. N. R. 685, 698; *Hotson v. Browne*, 9 C. B. N. S. 442.

(*n*) *Filmer v. Gott*, 4 Bro. P. C. 230; *Robinson v. Lord Vernon*, 7 C. B. N. S. 231; *Rogers v. Hadley*, 2 H. & C. 227.

So, also, if it appear from the written evidence, that the agreement really made between the parties is not stated by the deed, parol evidence is admissible to explain it (*nn*).

The testimony of a single witness, though uncorroborated, may be sufficient for the Court to conclude that there has been fraud (*o*). But the Court will never give any person anything on his own uncorroborated testimony against another after that other's death (*p*). Nor can the testimony of one single witness, unless supported by corroborating circumstances, be allowed to prevail against a positive denial by the answer. If a defendant positively, plainly, and precisely denies the assertion, and one witness only proves it as positively, clearly, and precisely as it is denied, and there is no corroborating circumstance attaching to the assertion to overbalance the credit due to the denial, as a positive denial, the Court will not act upon the testimony of that witness. Where, accordingly, a man positively denies notice, and one witness is adduced to prove the fact of notice, the Court will place as much reliance on the conscience of the defendant, as on the testimony of a single witness, without some circumstance attaching a superior degree of credit to the latter (*q*).

Testimony of single witness.

Denial by answer.

Where the Court has to depend solely on the evidence of the party himself to prove that there was false representation made to him as to the contents of a deed at the time he executed it, the evidence must be looked at with very considerable care before it will act upon it, so as to set aside a deed as against the person, who *bonâ fide* acted on the faith of the deed being genuine (*r*).

(*nn*) *Cripps v. Jee*, 4 Bro. C. C. 411.
472.

(*o*) *Smith v. Thiffe*, 20 Eq. 666 ;
Clark v. Girdwood, 7 Ch. D. 18.

(*p*) *Hughes v. Seabor*, 18 W. R. 108 ; *Rogers v. Powell*, 38 L. J. Ch. 648 ; *Haggarth v. Wearing*, 12 Eq. 327 ; *Wynne Finch v. Wynne Finch*, 48 L. T. N. S. 129, W. N. (1883) 57, comp. *Lawrence v. Rowley*, 74 L. T.

(*q*) *Evans v. Bicknell*, 6 Ves. 183, per Lord Eldon ; *Pember v. Mathers*, 1 Bro. C. C. 52 ; *Lord Cranstown v. Johnson*, 3 Ves. 170 ; *East India Co. v. McDonald*, 9 Ves. 275 ; *Pilling v. Armitage*, 12 Ves. 80. See *Whitworth v. Gauguain*, Cr. & Ph. 325.

(*r*) 7 Ch. 88, per Mellish, L. J.

CHAPTER XI.

COSTS.

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THE general rule with respect to costs, being that costs follow the event, and that, *prima facie*, he who succeeds ought to have them (*a*) ; if a transaction is set aside (*b*), or an action for the specific performance of a contract is dismissed (*c*), on the ground of misrepresentation, concealment, undue influence, or any other species of fraud, the successful litigant is, as a general rule, entitled to the costs. So, also, if an action is brought for the rescission of a transaction, or for the recovery of money, on the ground of fraud, and the charge of fraud fails, the dismissal is, in general, with costs (*d*). So, also, when the specific performance of a contract is resisted on the ground of fraud, and the charge of fraud fails, the decree is, in general, with costs (*e*). So, also, when a purchaser obtains specific performance, with compensation, it will be, in general, with costs (*f*).

Costs on the dismissal of an appeal follow the result even in

(*a*) *Townsend v. Champenowne*, 3 Y. & C. 527 ; *Parr v. Lovegrove*, 4 Jur. N. S. 600.

(*b*) *Edwards v. McCleay*, 2 Sw. 289 ; *Bellamy v. Sabine*, 2 Ph. 425 ; *Dent v. Bennett*, 4 M. & C. 269 ; *Gibson v. D'Este*, 2 Y. & C. C. C. 581 ; *Mulhellen v. Marum*, 3 Dr. & War. 317 ; *Waters v. Thorn*, 22 Beav. 561 ; *Slim v. Croucher*, 1 D. F. & J. 520 ; *Dally v. Wonham*, 33 Beav. 162 ; *Baker v. Monk*, ib. 425 ; *Davies v. Davies*, 4 Giff. 417.

(*c*) *Vancouver v. Bliss*, 11 Ves. 463 ; *Lord Brooke v. Roundthwaite*, 5 Ha. 306 ; *Myers v. Watson*, 1 Sim. N. S. 529 ; *Cox v. Coventon*, 31 Beav. 388.

(*d*) *Langley v. Fisher*, 9 Beav. 91 ; *Loader v. Clark*, 2 Mac. & G. 387 ; *Pulsford v. Richards*, 17 Beav. 87 ; *Jennings v. Broughton*, ib. 239 ; *Dolman v. Nokes*, 22 Beav. 402 ; *New Brunswick, &c., Railway Co. v. Conybeare*, 9 H. L. 735 ; *Luff v. Lord*, 11 Jur. N. S. 50 ; *Straker v. Ewing*, 34 Beav. 147 ; *Chapman v. Chapman*, 9 Eq. 296 ; *Caryll v. Bower*, 10 Ch. D. 516.

(*e*) *Abbott v. Swoorder*, 4 Deg. & G. 460 ; *Haywood v. Cope*, 25 Beav. 140 ; *Clarke v. Mackintosh*, 4 Giff. 134.

(*f*) *Leyland v. Illingworth*, 2 D. F. & J. 248 ; *Gedye v. Duke of Montrose*, 26 Beav. 45.

cases where the Court of Appeal arrives at the same result as the Court below, though not on the same grounds (*g*).

Though the general rule is that, *prima facie*, he who succeeds ought to have the costs, costs do not always follow the event (*h*). There may be often circumstances of an equitable nature, to exempt the unsuccessful party from the payment of costs (*i*). When, for instance, a bill for the rescission of a transaction on the ground of misrepresentation was dismissed, the dismissal was without costs, the Court being satisfied, although the charges as to misrepresentation had failed, that the property had not been correctly described (*j*). So, also, where a bill for the rescission of a transaction, on the ground of undue influence, or of advantage taken of a fiduciary position, was dismissed on the ground of acquiescence, or delay in instituting the suit, or even on the merits, the dismissal was without costs, the Court being satisfied that the plaintiff had a reasonable cause of suit, or that the conduct of the defendant had rendered an investigation not unreasonable (*k*). So, also, if there has been negligence or misplaced confidence on the part of the plaintiff, he will not have his costs, although he succeed in the suit (*l*). So, also, although the Court declared that securities should stand as a security only for the money actually advanced, the defendant was allowed to have his costs added to the amount due on the securities (*m*). So, also, although a bill is dismissed, it will be without costs if there has been negligence (*n*). So, also,

(*g*) *Peek v. Gurney*, 6 E. & I. App. Ca. 413.

(*h*) *Staines v. Morris*, 1 V. & B. 16.

(*i*) *Vancouver v. Bliss*, 11 Ves. 463; *Townsend v. Champenoine*, 3 Y. & C. 527; *Grove v. Bastard*, 1 D. M. & G. 78.

(*j*) *Bartlett v. Salmon*, 6 D. M. & G. 40; *Hallows v. Fernie*, 3 Eq. 520.

(*k*) *Montesquieu v. Sandys*, 18 Ves. 301; *Champion v. Rigby*, 9 L. J. Ch. N. S. 211; *Fyler v. Fyler*, 3 Beav. 550; *Edwards v. Meyrick*, 2 Ha. 75;

De Montmorency v. Berceux, 7 Cl. & Fin. 188; *Salmon v. Cutts*, 4 Deg. & Sm. 125; *Baker v. Reed*, 18 Beav. 398; *Hartopp v. Hartopp*, 21 Beav. 274; *Wright v. Vanderplank*, 2 K. & J. 18; *Clegg v. Edmondson*, 8 D. M. & G. 806; *Clanricarde v. Henning*, 30 Beav. 175; *Toker v. Toker*, 3 D. J. & S. 487.

(*l*) *Allen v. Knight*, 5 Ha. 280; *Johnston v. Renton*, 9 Eq. 181.

(*m*) *Miller v. Cook*, 10 Eq. 641. *Comp. Nevill v. Snelling*, 15 Ch. D. 705.

(*n*) *Evans v. Bicknell*, 6 Ves. 173.

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although a transaction is set aside, the rescission may be without costs, if the defendant is free from moral blame (*o*); or if the plaintiff is not free from moral blame (*p*). So, also, costs were allowed to the trustees of a voluntary settlement, though it was set aside, as they seemed to have acted *bond fide*, and really with the desire to benefit the plaintiff (*q*). So, also, where the plaintiff is *particeps criminis*, and seeks to set aside a security on the ground of public policy, the decree will be without costs (*r*). So, also, although specific performance be decreed, the decree will be without costs, if the party resisting performance had a fair and reasonable ground for doing so (*s*). In *Higgins v. Samels* (*t*), where a bill for specific performance of a contract was dismissed, on the ground of misrepresentation, the dismissal was, under the circumstances of the case, without costs. The Court always exercises its discretion in dismissing a bill for specific performance, and with costs, on the ground of circumstances which would not be sufficient to cancel the agreement on the ground of fraud (*u*). If, on the other hand, the defendant has been to blame in the matter, or has by conduct contributed to the litigation, the dismissal of a bill for specific performance will be without costs (*x*).

As a general rule, where costs have been occasioned by the conduct of either party, the party who occasioned the costs must bear them; and where by the misconduct of both parties, neither has his costs: and where a suit has been rendered necessary by the misconduct of either party, still a part of the

(*o*) *Ward v. Hartpole*, 3 Bligh, 490; *Wood v. Abrey*, 3 Madd. 423; *Groves v. Perkins*, 6 Sim. 576; *Baker v. Carter*, 1 Y. & C. 250; *Stanton v. Tattersall*, 1 Sm. & G. 536; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394. In particular cases the plaintiff may have to pay the costs, although the transaction is set aside, if the defendant be free from moral blame. *Davies v. Otty*, 35 Beav. 208.

(*p*) *Lord Aylesford v. Morris*, 8 Ch. 498; *Lyon v. Home*, 6 Eq. 655.

(*q*) *Everitt v. Everitt*, 10 Eq. 410.

(*r*) *Debenham v. Ox*, 1 Ves. 276; *Morgan v. Bruen*, LL. & G. temp. Sug. 180; but see *Jackman v. Mitchell*, 13 Ves. 581. Comp. *Davies v. Otty*, 35 Beav. 208; *Ayerst v. Jenkins*, 16 Eq. 282.

(*s*) *Burroues v. Lock*, 10 Ves. 470; *Vancouver v. Bliss*, 11 Ves. 463; *Fenton v. Browne*, 14 Ves. 150. See *McQueen v. Farquhar*, 11 Ves. 482.

(*t*) 2 J. & H. 460.

(*u*) *Davis v. Synnods*, 1 Cox, 402.

(*x*) *Walters v. Morgan*, 3 D. F. & J. 718.

costs may have been rendered necessary by the other party (*y*). If, accordingly, a man succeeds in obtaining the relief prayed for, and has the costs of the suit generally, but fails to establish allegations of fraud in the bill, he must pay the costs occasioned by such allegations being introduced (*z*), or, for the sake of simplicity, no costs will be given to either side when, but for the allegations of fraud, the plaintiff would have been entitled to the costs (*a*). In *Parker v. M'Kenna* (*b*), the plaintiff set up a case which entitled him to relief and also a separate case of fraud : so much of his bill as was founded on the case of fraud was dismissed with costs, and he got no costs of the rest of the suit (*c*). In *Rhodes v. Bate* (*d*), the defendant was not ordered to pay costs, though the transaction was set aside, inasmuch as the case of the plaintiff failed to a considerable extent, and inasmuch as in so far as it succeeded, it was by force of the law of the Court, and not by any merits of his own, the evidence adduced by him being also irrelevant and overcharged. In *Staniland v. Willot* (*e*), where charges of fraud in the bill were neither supported nor repelled by evidence on either side, the costs were not thereby affected, as it did not appear that any costs were specially occasioned by such charges. In *Fyler v. Fyler* (*f*), however, a bill containing unproven charges of fraud was dismissed without costs, because the defendants, by mixing up their personal interests in the transactions in question, had rendered an investigation not unreasonable. In like manner, charges of fraud made by defendants will, if unsubstantiated, be visited with costs, even though the defendant gets the costs of the suit generally (*g*). So, also, the introduction of charges of

(*y*) *Parr v. Lovegrove*, 4 Jur. N. S. 601, per Kindersley, V. C.

(*z*) *Blest v. Brown*, 4 D. F. & J. 367 ; *Jones v. Ricketts*, 10 W. R. 576 ; *Tabor v. Cunningham*, 24 W. R. 156 ; *Clinch v. Financial Corporation*, 5 Eq. 450 ; *Thomson v. Eastwood*, 2 App. Ca. 236. See *Harvey v. Mount*, 8 Beav. 439 ; *Shackleton v. Sutcliffe*, 1 Deg. & Sm. 623 ; *Bromley v. Smith*, 26 Beav. 670 ; *St. Albans*

v. Harding, 27 Beav. 11 ; *Baker v. Bradley*, 7 D. M. & G. 620.

(*a*) *Cullingworth v. Lloyd*, 2 Beav. 385 ; *Rochins v. Wickham*, 1 Giff. 355 ; *Tyler v. Yates*, 6 Ch. 665.

(*b*) 10 Ch. 96.

(*c*) See *Gray v. Lewis*, 8 Ch. 1035.

(*d*) 1 Ch. 262.

(*e*) 3 Mac. & G. 664.

(*f*) 3 Beav. 550.

(*g*) *Wright v. Howard*, 1 Sim. &

fraud which are irrelevant and cannot be tried is improper. The plaintiff must in such a case pay all defendant's costs incurred by reason of such charges as between solicitor and client (*h*). So, also, the bill will be dismissed without costs, if the conduct of the defendant has not met with the approval of the Court (*i*).

Where a man succeeds in the main point in having a deed set aside but fails in a particular issue, he must have the costs generally except so far as they have been increased by the issue in which he has failed, and the costs of the issue in which he has failed will be given to the party who has succeeded in that issue, and one set of costs will be set off against the other. When the case is appealed against by the defendant and the plaintiff succeeds substantially, he is entitled to have the whole costs of the appeal, and the cross appeal (*k*).

Where plaintiff succeeds in a suit on the ground of fraud, he will be entitled to all the costs occasioned by it, and, therefore, in *Stanley v. Bond* (*l*), a bill for the delivery of securities fraudulently obtained being taken *pro confesso*, the plaintiff was held entitled to the costs of an action at law commenced on the securities, though not specifically prayed for by the bill.

If a statement of claim containing allegations of fraud be demurrable, and the defendant do not demur, his not having demurred will be a reason for refusing him his extra costs at the hearing (*m*).

Where a statement of claim alleged particular facts which amounted practically to a charge of fraud against a particular defendant, but by the accidental omission of several facts the pleading was technically incomplete, a demurrer by defendant was allowed without costs, but with leave to amend, and the costs were reserved (*n*). In a case where the plaintiff charged

St. 205; *Warrin v. Thomas*, 2 W. R. 442; *Pledge v. Buss*, John. 666; (*k*) *Cracknall v. Janson*, 11 Ch. D. 23.

Theyer v. Tombs, 12 W. R. 512. (*l*) 6 Beav. 423.

(*h*) *Forester v. Read*, 6 Ch. 40. (*m*) *Nesbitt v. Berridge*, 1 N. R.

(*i*) *Leather Cloth Co. v. American* 345, 4 D. J. & S. 50.

Leather Cloth Co., 33 L. J. Ch. 199; (*n*) *Hodges v. Hodges*, 2 Ch. D. 112.
Peck v. Gurney, 13 Eq. 79.

fraud against the demurring defendant, the demurrers being allowed and leave to amend given, the question whether their costs of the demurrers should be paid by the plaintiff was reserved till the trial of the action (*o*).

If acts are charged against a party which are in themselves fraudulent, the Court, upon the question of costs, always considers the bill as imputing fraud, although the word fraud be not used in the bill (*p*).

Although a suit cannot be maintained, the Court may dismiss it before the hearing, even without costs, if the defendant has been guilty of gross fraud (*q*).

Where the liability of the director of a company to refund commissions illegally obtained by him had been affirmed with costs, but the decision was reversed by the Lord Chancellor, with costs, and on appeal to the House of Lords, the order of the Lord Chancellor was reversed but the original decree was varied in some of its details, no costs were given, but the case with a declaration was remitted to the Court of Chancery to do what should be just in accordance with the decision of this House (*r*).

A solicitor, or legal adviser, who has abetted or mixed himself up in that character, in a fraudulent transaction, or has prepared improper instruments which afterwards lead to litigation, may be made a party to the suit, for the mere purpose of having the costs paid by him (*s*). He cannot excuse himself from the payment of costs, on the ground that he acted as his client's adviser (*t*). In a case where a solicitor was free from all moral blame, and took no benefit from the transaction, the costs of a suit to set aside the transaction were nevertheless thrown on him, because he had not explained to his client the nature of the instrument (*u*).

(*o*) *Duckett v. Gover*, 6 Ch. D. 82.

(*p*) *Marshall v. Sladden*, 7 Ha. 444.

(*q*) *Elsey v. Adams*, 2 D. J. & S. 147.

(*r*) *Imperial Mercantile Credit Association v. Coleman*, 6 E. & I. App. Ca. 189.

(*s*) *Marshall v. Sladden*, 7 Ha.

443; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394; *Baker v. Loader*, 16 Eq. 49. See *Brent v. Brent*, 10

L. J. Ch. 84.

(*t*) *Bennett v. Vale*, 2 Atk. 324; *Harvey v. Mount*, 8 Beav. 439.

(*u*) *Moore v. Prance*, 9 Ha. 303. See *Beadles v. Burch*, 10 Sim. 332; *Berry v. Armitstead*, 2 Keen, 227;

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Although costs may not be given against a solicitor who has mixed himself up in a fraudulent transaction, costs will not be given to him (*x*). In *Harvey v. Mount* (*y*), a solicitor who acted as such in a transaction which was impeachable on the ground of fraud, but was himself free from moral culpability, was ordered to pay his own costs, as he had not acted with proper prudence in the matter. So, also, in *Fyler v. Fyler* (*z*), where a solicitor, by mixing up his personal interest in his client's transactions, rendered an investigation not unreasonable, the bill was dismissed against him without costs, though it contained unproven charges of fraud.

Where a solicitor has not been guilty of participation in a fraud, but at most only of a blunder, for which the remedy is an action for professional negligence, there is no jurisdiction to order him to pay the costs of the suit (*a*).

No other person can be made a defendant for the purpose of having the costs paid by him, but a solicitor or other agent, or an arbitrator (*b*).

The costs of a suit to set aside a deed for fraud, will not be given against a solicitor, or party to the fraud, if they are not specifically prayed in the statement of claim (*c*). If they are not specifically prayed, a demurrer will lie (*d*).

If a man be accessory to a fraud on creditors, as being the trustee of a voluntary settlement, he will not be allowed his costs on setting aside the deed, although he may have derived no benefit from it (*e*).

In a case where the name of a man had, by the false representations of a third party, been inserted on the register of the shareholders of a company, it was held that the company, though innocent, must bear the costs of the application (*f*).

Gilbert v. Lewis, 1 D. J. & S. 52 ;

Bagnall v. Carlton, 6 Ch. D. 371.

(*x*) *Roddy v. Williams*, 3 J. & L. 23.

(*y*) 8 Beav. 439.

(*z*) 3 Beav. 550.

(*a*) *Clark v. Girdwood*, 7 Ch. D. 9.

(*b*) *Weise v. Wardle*, 19 Eq. 172.

See *Barnes v. Addy*, 9 Ch. 244.

(*c*) *Beadles v. Burch*, 10 Sim. 338 ;

Roddy v. Williams, 3 J. & L. 16.

(*d*) *Beadles v. Burch*, 10 Sim. 338.

(*e*) *Townsend v. Westacott*, 4 Beav. 58 ; *Turquand v. Knight*, 14 Sim. 644.

(*f*) *Re Patent File Co.*, 15 W. R. 754.

The Consolidated Orders 38, r. 2, reg. 2, do not contemplate the cause of fraud, so that, although the value of the subject-matter of the suit at the time of filing the bill may be considerably less than 1000*l.*, the costs will be allowed on the higher scale (*g*).

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(*g*) *Earl of Stamford v. Dawson*, 15 W. R. 896.

PART II.—MISTAKE.

CHAPTER I.

Chap. I.

MISTAKE may be said to be some unintentional act, omission, or error arising from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence (*a*). There is mistake if a man through ignorance be induced to do a thing which he would not have done, had he not been in error (*b*).

Mistake may be either in matter of law or in matter of fact (*c*).

Mistake of law.

A mistake of law happens when a party having full knowledge of the facts comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference arising from an imperfect or incorrect exercise of the judgment upon facts as they really are (*d*). Mistake as to foreign law is a mistake of fact (*e*).

The rule that mistake in matter of law cannot be admitted as a valid excuse either for doing an act prohibited by the law, or for the omission of a duty which it imposes, is common to all systems of law. *Regula est juris ignorantiam cuique nocere*, is the language of the Pandects (*f*). *Ignorantia juris non excusat*, is the maxim of the common law. "It is to be presumed," says Manwood, as reported by Plowden (*g*), "that no subject of this realm is miscognisant of the law whereby he

(*a*) Story, Eq. Jur. 110.

(*b*) Jeremy, Eq. Jur. Bk. 2, pt. 2, p. 358.

(*c*) Dig. Lib. 22, tit. 6.

(*d*) *Hurd v. Hall*, 12 Wis. (Amer.), 113; *Burkhauser v. Schmitt*, 30 Amer.

Rep. 743.

(*e*) *Imperial, &c., Assicuratrice of Trieste v. Funder*, 21 W. R. 116.

(*f*) Dig. Lib. 22, tit. 6, leg. 9.

(*g*) 1 Plowd. 342.

is governed. Ignorance of the law excuseth none " (*h*). There is, however, no presumption of law in this country, that every one knows the law. The rule is that ignorance of law shall not excuse a man or relieve him from the consequences of a crime or from liability on a contract (*i*). The rule is not only expedient, but is absolutely necessary. If ignorance of law were admitted as a ground of exemption, the Court would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable, for in almost every case ignorance of law would be alleged, and the Court would for the purpose of determining the point, be often compelled to enter upon questions of fact, insoluble and interminable (*h*).

The rule is the same in equity. Mistake in matter of law cannot in general be admitted as a ground of relief in equity (*l*).

The maxim, *juris ignorantia non excusat*, is not, however, universally applicable in equity (*m*). "If," said Lord Westbury in *Cooper v. Phibbs* (*n*), "the word *jus* is used in the sense of denoting general law, the ordinary law of the country, no exception can be admitted to the general application of the maxim; but it is otherwise when the word *jus* is used in the sense of denoting a private right. Private right of ownership is a matter of fact; it may also be the result of a matter of law, but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded on a common mistake." "Ignorance of a matter of law," said Lord

(*h*) See *Manser's Case*, 2 Co. Rep. 3 *a*, *b*.; *Cook v. Wotton*, 4 Leon. 190; *Stevens v. Lynch*, 12 East, 38; *Teede v. Johnson*, 11 Exch. 840; *Pooley v. Brown*, 11 C. B. N. S. 566.

(*i*) *Martindale v. Fulkner*, 2 C. B. 719, *per* Maule, J.; *Reg. v. Mayor of Tewkesbury*, L. R. 3 Q. B. 635, *per* Lord Blackburn.

(*k*) Austin, Jur. vol 2, p. 172.

(*l*) *Mahden v. Menill*, 2 Atk. 8; *Mildmay v. Hungerford*, 2 Vern.

243; *Marshall v. Collett*, 1 Y. & C. 232; *Denys v. Shuckburgh*, 4 Y. & C. 42; *Mellers v. Duke of Devonshire*, 16 Beav. 257; *Teed v. Johnson*, 25 L. J. Exch. 110; *Midland Great Western Co. of Ireland v. Johnson*, 6 H. L. 798.

(*m*) *Naylor v. Winch*, 1 Sim. & St. 555; *Watson v. Marston*, 4 D. M. & G. 230, 236; *Stone v. Godfrey*, 5 D. M. & G. 76, 90.

(*n*) 2 E. & I. App. Ca. 170.

Chelmsford in *Lord Beauchamp v. Winn* (o), "arising upon the doubtful condition of a grant is very different from ignorance of a rule of law. Therefore, although where a certain construction has been put by a Court of law on a deed, it must be taken that the legal construction was clear, yet the ignorance before the decision of what was the true construction cannot be pressed to the extent of depriving a person of relief, on the ground that he was bound himself to have known beforehand how the grant must be construed." When, therefore, a man through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a Court of equity may grant relief, if under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired (p).

(o) 6 E. & I. App. Ca. 234.

(p) See *Cann v. Cann*, 1 P. Wms. 727; *Pusey v. Desbouverie*, 3 P. Wms. 320; *Cocking v. Pratt*, 1 Ves. 400; *Farewell v. Coker*, cit. 2 Mer. 353; *Naylor v. Winch*, 1 Sim. & St. 555; *Macarthy v. Decaire*, 2 R. & M. 614; *Clifton v. Cockburn*, 3 M. & K. 99; *Sturge v. Sturge*, 12 Beav. 229; *Davis v. Morier*, 2 Coll. 308; *Reynell v. Sprye*, 8 Ha. 222, 255; *Cox v. Bruton*, 5 W. R. 544; *Stone v. Godfrey*, 18 Jur. 162; *Cooper v. Phibbs*, 17 Ir. Ch. 82; *D'Aguesseau*, vol. 9, p. 629; *Toullier*, Cod. Civ. Liv. 3, tit. 3, c. 2, s. 62; *Larombière*, *Théorie des Oblig.* vol. 1, p. 43, 57. The misapprehension of rights under a deed, not arising from the misconstruction of the deed, is, it has been said, a mistake in fact, and is consequently relievable in equity. *Denys v. Shuckburgh*, 4 Y. & C. 42.

A distinction was taken by Papiinian in regard to ignorance of law; according to him, if a man had been induced by his ignorance of law to

part with what was his own, he might recover it or be placed *in statu quo*, but the pretence of ignorance of law could not be used to enable a man to acquire what had not been his own or to better his condition. *Story*, Eq. Jur. 623. According to the Roman law there were certain classes of persons "*quibus permissum est jus ignorare*." Dig. Lib. 22, tit. 6, leg. 9. They were exempt from liability (at least for certain purposes), not by reason of their general imbecility, but because it was presumed that their capacity is not adequate to a knowledge of the law. Such were women, soldiers, and persons who had not reached the age of twenty-five. Ignorance of law, considered *per se*, was in these cases considered a ground of exemption. In such cases it was presumed from the sex, or from the age, or from the profession of the party, that the party was ignorant of the law, and that the ignorance was inevitable. *Austin*, Jur. vol. 2, p. 174. The persons

Mistake in law, to be a ground for relief in equity, must be of a material nature, and a determining ground of the transaction (*q*). If a man has been made aware of the question of law on which his title depends, and deliberately determines to give up the matter, he cannot afterwards have relief on the ground of a mistake in matter of law (*r*).

Mistake of law may be a misapprehension of the law, or of their private rights to property by both parties to a transaction, both of them making substantially the same mistake; or it may be a misapprehension of the law or of his private right by one of the parties alone.

If an agreement be entered into between two parties in mutual mistake as to their relative and respective rights, either of them is entitled to have it set aside (*s*). Where, for instance, a party entered into an agreement with another to take a lease of what in fact was his own property, both parties being under a common mistake as to their respective rights, the transaction was set aside (*t*). So, also, where a man had sold another an estate which in truth belonged to him, and the conveyance was completed, the Court rescinded the transaction, and ordered the purchase-moneys to be refunded (*u*). So also where the second of three brothers having died, the eldest, who had entered upon his deceased brother's share, agreed to divide it with his youngest brother, upon the representation of a third party whom the two brothers had consulted, that, as land could not ascend, the youngest brother was heir to the second, and exe-

Mutual mistake of parties as to their rights.

"*quibus permissum est jus ignorare*," could not, however, allege with effect their ignorance of the law in case they violated those parts of it which were founded on the *jus gentium*. For the persons in question are not generally imbecile, and the *jus gentium* was knowable *naturali ratione*. With regard to the *jus civile*, or to those parts of the Roman law which were peculiar to the system, they might allege with effect their ignorance of the law. Austin, Jur. vol. 2, p. 175. See

Lindl. on Jur. p. 24.

(*q*) *Stone v. Godfrey*, 5 D. M. & G. 76.

(*r*) *Ib.*; *Rogers v. Ingram*, 3 Ch. D. 351.

(*s*) *Cooper v. Phibbs*, 2 E. & I. App. Ca. 149; *Earl Beauchamp v. Winn*, 6 ib. 233. See *Bulley v. Bulley*, 9 Ch. 740.

(*t*) *Cooper v. Phibbs*, 2 E. & I. App. Ca. 149; *Jones v. Clifford*, 3 Ch. D. 779.

(*u*) *Bingham v. Bingham*, 1 Ves. 126; *Jones v. Clifford*, 3 Ch. D. 792.

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cuted a conveyance accordingly, Lord King relieved the eldest brother against the instrument (*x*). So also where an administrator sold lands to B., both supposing the fee was conveyed, whereas only an equity of redemption passed, it was held that the Court would relieve the purchaser (*y*).

Mistake as to
his right by one
party alone.

If the mistake of law, or as to his private right, be that of one party only to a transaction, it may be either that the mistake was induced or encouraged by the misrepresentation of the other party, or that, though not so induced or encouraged, it was known to and perceived by him, and was taken advantage of, or it may be that he was not aware of the mistake. Whatever may be the circumstances of the case, a Court of equity may, under the peculiar circumstances of the case, grant relief. But if it appear that the mistake was induced or encouraged by the misrepresentation of the other party to the transaction (*z*), or was perceived by him and taken advantage of, the Court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake (*a*). In *Broughton v. Hutt* (*b*), where the heir-at-law of a shareholder in a company, the shares in which were personal estate, supposing himself, through ignorance of law, to be liable in respect of the shares, had executed a deed taking the liability on himself, it was held that he was entitled to have the deed cancelled. So also where a man having a legal security gave it up in exchange for another security, upon the faith that the right which he gave up would be secured to him by the substituted security, but the substituted security proved to be a mere nullity in law, relief was given (*c*). So also where a woman renewed a note, believing that she was liable on the original note, relief was given (*d*).

(*x*) *Lansdowne v. Lansdowne*, Mose. 364, cit. 2 J. & W. 205.

(*y*) *Griffith v. Townley*, 33 Amer. R. 476.

(*z*) *Scholfield v. Templer*, John. 166; *Cooper v. Phibbs*, 2 E. & I. App. Ca. 149, *supra*, p. 53.

(*a*) *Cocking v. Pratt*, 1 Ves. 400; *McCarthy v. Incaix*, 2 R. & M. 614; *Sturge v. Sturge*, 12 Beav. 229;

Broughton v. Hutt, 3 D. & J. 501; *Powell v. Smith*, 14 Eq. 90; *Earl Beauchamp v. Winn*, 6 E. & I. App. Ca. 233.

(*b*) 3 D. & J. 501.

(*c*) *Re Saxon Life Assurance Co.*, 2 J. & H. 408, 1 D. J. & S. 29. See *Gee v. Spencer*, 1 Vern. 32; *Mildmay v. Hungerford*, 2 Vern. 243.

(*d*) *Coward v. Hughes*, 1 K. & J. 443.

So also where a sister, being ignorant of her rights under a settlement, released her rights to a brother, the release was held not binding on her (*e*). So also where the daughter of a free-man of London accepted of a legacy left her by her father, and released her orphanage part according to the custom of London, and it did not appear, though she was told she might elect between the legacy and the orphanage part, that she knew she had a right to inquire into the value of the personal estate and the quantum of the orphanage part before making her election, the release was set aside (*f*).

If there is no evidence to show that the mistake of law was known to or perceived by the other party to the transaction, the Court will not, except under very exceptional circumstances, interfere. Parties are understood to contract upon the common basis of the general law equally known to both, so that a mistake of general law can never be alleged by one party in his dealings with another, unless the other party is also involved in the mistake. Thus, where a lessor had contracted to grant a lease for seven or fourteen years, which by a general rule of legal construction, gives the option to the lessee, it was held not to be competent to him to allege in answer to a claim for specific performance that he understood and intended the option to be with the lessor; the mistake being not as to the terms but as to the legal effect of them, which he was bound to know (*g*).

As a general rule it is well established in equity as well as at law, that money paid under a mistake of law, with full knowledge of the facts, is not recoverable, and that even a promise to pay, upon a supposed liability, and in ignorance of the law, will bind the party (*h*). But the rule is liable to a qualification. Payment of money under mistake of law. X

(*e*) *Ramsden v. Hylton*, 2 Ves. 304. *man v. Sayers*, 2 J. & W. 263; *Currie v. Goad*, 2 Madd. 163; *Drewry v. Barnes*, 3 Russ. 94; *Webb v. Brookes*, 1 L. J. Ch. N. S. 191; *Great Western Railway Co. v. Cripps*, 5 Ha. 91;

(*f*) *Prisey v. Desbouverie*, 3 P. W. 315. *Platt v. Bromage*, 24 L. J. Exch. 63;

(*g*) *Powell v. Smith*, 14 Eq. 85. *Bate v. Hooper*, 5 D. M. & G. 338;

(*h*) *Bilbie v. Lumley*, 2 East, 469; *Stevens v. Lynch*, 12 East, 38; *Brisbane v. Dacres*, 5 Taunt. 143; *Goad-Stafford v. Stafford*, 1 D. & J. 197;

* See an article therein 143 L.T. 35 (1915/17)

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tion, if the man to whom money has been paid has been accessory to the error of the other party, or has got some one to misinform him of the law (*i*). If the law mistaken is the law of a foreign state, the mistake is regarded as a mistake of fact (*j*).

"If," said James, L.J., in *Rogers v. Ingram* (*k*), "the proposition were true that in every case where money has been paid under a mistake as to legal rights, it could be recovered back, it would open a fearful amount of litigation and evil in cases of distribution of estates, and it could be difficult to say what limit could be placed to this kind of claim, if it could be made after a trustee has distributed the whole estate among the persons supposed to be entitled, every one of them having knowledge of all the facts and having given a release. The thing has never been done, and it is not a thing which, in my opinion, should be encouraged. When people have knowledge of all the facts and take advice, and whether they get proper advice or not, and the business is settled, it is not for the good of mankind that the matter should be reopened" (*l*). Where accordingly an executor under the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees, but one of the legatees being dissatisfied took the opinion of counsel, which agreed with the former opinion, and two years afterwards the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed and claiming repayment from the other legatee, it was held that the suit could not

Saltmarsh v. Barrett, 31 L. J. Ch. 783; *O'Loughlen v. O'Callaghan*, 1 R. 8 C. L. 120; *Rogers v. Ingram*, 3 Ch. D. 351. See *Moore v. Moore*, 1 Coll. 54. Where money had been paid for many years without deducting the land-tax, no deduction was afterwards allowed out of the subsequent payments. *Nicholls v. Leeson*, 3 Atk. 573. So, also, where an executor had paid interest for seventeen years without deducting the property-tax, it was held he could not afterwards

deduct out of the future interests due the amount of property-tax on such precedent payments. *Currie v. Gould*, 2 Madd. 163.

(*i*) *Dixons v. Monkland Canal*, 5 Wills. & Sh. Sc. Ap. 445.

(*j*) *Haven v. Foster*, 9 Pick. (Amer.), 112. See *Leslie v. Baillie*, 2 Y. & C. C. C. 91.

(*k*) 3 Ch. D. 356.

(*l*) See *Hilliard v. Fulford*, 4 Ch. D. 390.

be maintained (*m*). So also where there had been a payment and acceptance of money between two parties under a mutual mistake of law, and it appeared under the circumstances of the case that the party who received the money received it as a composition in lieu of a larger sum, it was held that he could not afterwards sue for the balance (*n*).

A Court of equity has, however, power to relieve against payment of money in mistake of law, if there is any equitable ground which makes it under the particular facts of the case inequitable that the party who received the money should retain it (*o*). Thus in *Davis v. Morier* (*p*), where a trustee who had received the whole income of a trust fund on trust to apply the same properly, retained to himself all except 500*l.* a year, and it appeared that 500*l.* a year was not all that he ought to have paid to the *cestui que trust*, it was held that the *cestui que trust* was entitled to have the deficiency paid to him out of the estate of the deceased settlor. So, also, in *Ex parte James* (*q*), a trustee in bankruptcy was ordered to pay back to an execution creditor monies which the latter had paid over to him in mistake of law. So also an executrix who under a mistake as to the construction of a will, had overpaid an annuitant, was permitted to deduct the amount overpaid from subsequent payments (*r*). So, also, where accounts were drawn up and assented to under a common mistake of law as to their respective rights and interests by the parties, certain sums having been wrongly credited, the accounts, though settled, were reopened (*s*).

Whether money paid under mistake of law can be reclaimed is a subject which has led to much difference of opinion among civilians and the commentators on the Roman law. The old school of lawyers were of opinion that money paid under mistake of law might be recovered back. But Cujas maintained an opposite opinion, and he was followed by Pothier and others;

(*m*) *Rogers v. Ingram*, 3 Ch. D. 351.

(*n*) *Kitchin v. Hawkins*, L. R. 2 C. P. 285.

(*o*) *Rogers v. Ingram*, 3 Ch. D. 357, *per Mellish*, L. J.

(*p*) 2 Coll. 303.

(*q*) 9 Ch. 614.

(*r*) *Livesey v. Livesey*, 3 Russ. 287.

(*s*) *Daniel v. Sinclair*, 6 App. Ca. 181.

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Vinnius, however, Huber and D'Aguesseau supported the doctrine of the earlier school (*t*). The framers of the Code Napoleon adopted their opinion, and declared, in general terms, that money paid under mistake may be recovered back, making no distinction, in this respect, between mistake of law and mistake of fact (*u*). The earlier authorities on the Scottish law are in favour of the doctrine that money paid under mistake of law may be recovered back (*x*). In two cases, however (*y*), Lord Brougham laid it down that at Scotch law money paid under mistake of law is not recoverable. But there is much reason to doubt whether the rule so laid down by him can be accepted as a sound exposition of the Scotch law. His judgment was founded solely on two English common-law authorities (*z*).

Mistake of law
not a ground for
setting aside a
compromise.

Mistake in law is not a ground for setting aside a compromise, if the parties to the transaction were in difficulty and doubt, and wished to put an end to disputes, and to terminate or avoid litigation. If one or more parties, having, or supposing they have, claims upon a given subject matter, or claims against each other, agree to compromise these claims, and the knowledge, or means of knowledge, of each of them with respect to the mode in which, and the circumstances under which, his claim arises, stand upon an equal footing, and there is an absence of fraud or misrepresentation, the transaction is binding, although the conclusion at which the parties may have arrived is not that which a court of justice would have arrived at had its decision been sought. The real consideration which each party receives under a compromise being, not the sacrifice of the right, but the settlement of the dispute, and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only, and that the others had no right whatever. If, for instance, two parties claim adversely to each other the inheritance of a deceased person, and, in order to avoid litigation, agree to divide the inheritance, it is no ground for

(*t*) See Pothier, *Obl.* translated by Evans, App. vol. 2, pp. 408—437.

(*u*) *Cod. Civ.* 1377.

(*x*) *Mor. Dict.* Dec. 2930, 2931.

(*y*) *Wilson v. Sinclair*, 4 Wills. &

Sh. 398; *Dixons v. Monkland Canal Co.*, 5 Wills. & Sh. 445.

(*z*) *Bilbie v. Lumley*, 2 East, 469; *Brisbane v. Ducrest*, 5 Taunt. 143.

setting aside the agreement that only one was heir, and that the other gave up the right which he really possessed. The fact that the one may have had no claim is immaterial, if he was honestly mistaken as to his claim. It is enough if at the time of the compromise he may have believed he had a claim, and that the parties have, by the transaction, avoided the necessity of going to law (*a*). To render valid the compromise of a litigation, it is not even necessary that the question in dispute should really be doubtful, if the parties *bonâ fide* consider it to be so. It is enough to render a compromise valid, that there is a question to be decided between them (*b*). A compromise of doubtful rights will not be set aside on any other ground than fraud (*c*). In dealing with a compromise all that a Court of Justice has to do is to ascertain that the claim or the representation on the one side is *bonâ fide* and truly made, and that on the other side the answer or defence or counterclaim is also *bonâ fide* and truly made. All that the parties contemplate and desire to effect and deal with, is whether the claim on the one side, or the defence on the other, shall be admitted or not, or whether if both things are *bonâ fide* brought forward, there may not be some concession on the one side and some concession on the other side, so as to arrive at terms of agreement which if honestly made is an honest settlement of an existing dispute. If so made, a Court of Justice will respect it and not allow it to be questioned (*d*).

The jurisdiction of equity over mistake is exercised much more liberally where the mistake is in matter of fact, than where

- (*a*) *Stapilton v. Stapilton*, 1 Atk. P. C. 270; *Bullock v. Downes*, 9 H. 10; *Gordon v. Gordon*, 3 Sw. 463; L. 1; *Brooke v. Lord Mostyn*, 2 D. J. & S. 373; *Lord Belhaven's Case*, 3 D. J. & S. 41; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 450.
- (*b*) *Ex parte Lucy*, 4 D. M. & G. 149; *Stewart v. Stewart*, 6 Cl. & Fin. 356. See *Neale v. Neale*, 1 Keen, 969; *Pickering v. Pickering*, 2 Beav. 672.
- (*c*) *Brooke v. Lord Mostyn*, 2 D. J. & S. 373, *supra*, pp. 94, 95.
- (*d*) *Dixon v. Evans*, 5 E. & I. App. Ca. 606.
- Leonard v. Leonard*, 2 Ba. & Be. 179; *Naylor v. Winch*, 1 Sim. & St. 555, 7 L. J. Ch. 6; *Harvey v. Cooke*, 4 Russ. 34; *Attwood v. —*, 5 Russ. 149; *Pickering v. Pickering*, 2 Beav. 56; *Reynell v. Sprye*, 8 Ha. 222, 254; *Ex parte Lucy*, 4 D. M. & G. 356; *Lawton v. Campion*, 18 Beav. 87; *Partridge v. Stephens*, 9 Jur. N. S. 742; *Trigge v. Lavallée*, 15 Moo.

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it is in matter of law. The admission of ignorance of fact as a ground of relief, is not attended with those inconveniences which seem to be the reason for rejecting ignorance of law as a valid excuse. Whether the ignorance really existed, and whether it was imputable or not to the inadvertence of the party, is a question which may be solved by looking at the circumstances of the case. The inquiry is limited to a given incident, and to the circumstances attending that incident, and is, therefore, not interminable (*e*).

Opinion of Savigny as to distinction between mistake of law and mistake of fact.

According to Savigny, ignorance has not, as such, any effect upon the legal consequences of an act or transaction in which it occurs. The effect generally attributed to ignorance is properly attributable to the negligence which is the cause of it. Ignorance which is not the effect of gross negligence is not prejudicial to the ignorant party, but ignorance which is the effect of such negligence is prejudicial to him. Whether ignorance be or be not the result of gross negligence, depends on circumstances; it is presumed to be so when a man is ignorant of the general laws of his country, or of his own affairs, but it is not so presumed when he is ignorant of other matters. The presumption which arises in each of these cases is rebuttable, but is conclusive if not rebutted by the person against whom it arises. Ignorance of matters of law and ignorance of matters of fact, are thus placed on the same footing; both are prejudicial when the result of gross negligence; both are harmless when not so (*f*).

Definition of mistake of fact.

Mistake of fact is a mistake not caused by the neglect of legal duty on the part of the person making the mistake (*g*), and consisting in an unconsciousness (*h*), ignorance (*i*), or forgetfulness (*k*) of a fact past (*l*) or present (*m*), material to the

(*e*) Austin, Jur. vol. 2, p. 172.

(*f*) Lindley on Jur. App. p. 19.

(*g*) New York Civil Code, Art. 762.

(*h*) See *Kelly v. Solari*, 9 M. & W. 54.

(*i*) See *Cocking v. Pratt*, 1 Ves. 400; *East India Co. v. Neave*, 5 Ves. 173; *East India Co. v. Donald*, 9 Ves. 275; *Hore v. Becher*, 12 Sim.

465; *Bell v. Gardiner*, 4 M. & G. 11.

(*k*) *Kelly v. Solari*, 9 M. & W. 54; *Lucas v. Worswick*, 1 Moo. & R. 293.

(*l*) See *East India Co. v. Neave*, 5 Ves. 173; *East India Co. v. Donald*, 9 Ves. 275; *Willan v. Willan*, 16 Ves. 72; *McCarthy v. Decaix*, 2 R. & M. 614.

(*m*) See *Cocking v. Pratt*, 1 Ves.

transaction ; or in the belief in the present existence of a thing material to the transaction, which does not exist'(*n*), or in the past existence of a thing which has not existed (*o*). Chap. I.

In "fraud," as distinguished from "mistake," there is, necessarily, a misapprehension or mistake in the party defrauded, which alone would not vitiate his dealings with others ; but there is the additional circumstance that the party with whom he deals intentionally causes the mistake for the purpose of effecting the dealing, and this precludes the party so occasioning the mistake from holding the other bound to it. Mistake as distinguished from fraud.

What is the nature or degree of mistake which is relievable in equity, as distinguished from mistake which is due to negligence (*p*), and therefore not relievable, cannot well be defined so as to establish a general rule, and must, in a great measure, depend on the discretion of the Court under all the circumstances of the case. Though the Court will relieve against mistake, it will not assist a man whose condition is attributable only to that want of due diligence which may be fairly expected from a reasonable person (*q*). Parties, for instance, who, having a good defence, or plain and complete remedy at law, have neglected to avail themselves of it there, cannot come to equity for relief (*r*). Nor has a purchaser who is evicted by reason of a defect in title, which his legal adviser has overlooked, an Mistake as distinguished from negligence.

400 ; *Hore v. Becher*, 12 Sim. 465 ; *Colyer v. Clay*, 7 Beav. 188 ; *Broughton v. Hutt*, 3 D. & J. 501.

(*n*) See *Hitchcock v. Giddings*, 4 Pri. 135 ; *Colyer v. Clay*, 7 Beav. 188 ; *Hastie v. Couturier*, 9 Exch. 102, 5 H. L. 673 ; *Strickland v. Turner*, 7 Exch. 208 ; *Cochrane v. Willis*, 1 Ch. 58.

(*o*) See New York Civil Code, Art. 762.

(*p*) *Supra*, pp. 93, 94. Facti ignorantia ita demum cuique non nocet, si non ei summa negligentia obijciatur. Quid enim si omnes in civitate sciant quod ille solus ignorat. Dig. Lib. 22, tit. 6, l. 9.

(*q*) *Duke of Beaufort v. Neeld*, 12

Cl. & Fin. 248, 286 ; *Campbell v. Ingilby*, 1 D. & J. 403 ; *Leuty v. Hillas*, 2 D. & J. 110 ; *Wild v. Hillas*, 18 L. J. Ch. 170. See *Trigge v. Lavallée*, 15 Moo. P. C. 270 ; *Grymes v. Sanders*, 3 Otto (Amer.), 61.

(*r*) *Stephenson v. Wilson*, 2 Vern. 325 ; *Blackhall v. Coombs*, 2 P. W. 70 ; *Holworthy v. Mortlock*, 1 Cox, 141 ; *Hankey v. Vernon*, 2 Cox, 12 ; *Stevens v. Præd*, 2 Ves. Jr. 529 ; *Bateman v. Willoe*, 1 Sch. & Lef. 201 ; *Hare v. Horwood*, 14 Ves. 31 ; *Drewry v. Barnes*, 3 Russ. 94. See *Marquis of Breadalbane v. Marquis of Chandos*, 2 M. & C. 719 ; *Henderson v. Cook*, 4 Drew. 306.

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equity to recover his purchase-money (*s*). Nor can relief be had against a forfeiture, where a man who is charged with a legal obligation neglects to perform it (*t*). So, also, where a sum of money was paid by the purchaser of an estate to persons supposed to be entitled in remainder, to procure their concurrence in a recovery, which was suffered accordingly, Lord Nottingham refused to direct the money to be refunded (*u*).

Mistake as a
ground of relief
must be mate-
rial, &c.

Mistake in matter of law or matter of fact, to be a ground for relief, must be of a material nature, and must be the determining ground of the transaction. A man who seeks relief against mistake must be able to satisfy the Court that his conduct has been determined by the mistake. Mistake in matters which are only incidental to and are not of the essence of a transaction, and without, or in the absence of which it is reasonable to infer that the transaction would nevertheless have taken place, goes for nothing. If the mistake has not been the only cause by which the conduct of a man has been induced, but another motive has intervened, the mistake cannot be set up as a ground for relief (*x*). Nor, indeed, does the circumstance that the mistake may be in a material matter always of itself entitle a man to the interposition of the Court. The law does not go the length of requiring that parties who deal with each other at arms' length, should be on the same level as to information and knowledge. If parties stand upon an equal footing, and the means of information and knowledge are open to them both, either of them is entitled to the benefit of his own judgment, skill, and sagacity. If the parties act otherwise fairly in the transaction, and it is not a case in which one of them is bound, upon the ground of confidence, or otherwise, to make a disclosure to the other of matters affecting the subject matter in respect of which they are dealing, the Court will not interfere. A man cannot have relief on the ground of mistake, unless the

(*s*) *Urmston v. Pate*, 3 Ves. 235, n. See *Cator v. Lord Pembroke*, 1 Bro. C. C. 301, 2 Bro. C. C. 282; *Thomas v. Powell*, 2 Cox, 394.

(*t*) *Gregory v. Wilson*, 9 Ha. 683, 689.

(*u*) *Maynard v. Moseley*, 3 Sw. 651.

(*x*) *Stone v. Godfrey*, 5 D. M. & G.

76; *Carpmael v. Powis*, 10 Beav. 39; *Trigge v. Lavallée*, 15 Moo. P. C. 276; *Grymes v. Sanders*, 3 Otto (Amer.), 60. See Poth. Oblig. part 1, c. 1, s. 1, art. 3, s. 1; Domat. Liv. 1, tit. 18, sec. 1, art. 13—17; Toull. Cod. Civ. Liv. 3, c. 2, s. 2, art. 1—4.

party benefited by the mistake is disentitled in equity and conscience from retaining the advantage which he has acquired (y). Chap. I.

Mistake of fact is not the less a ground for relief because the person who made the mistake had the means of knowledge (z).

Mistake of fact may be the mistake of one party only to a contract, or there may be a mistake of both parties respecting the same matter; and thus there arise two different conditions of the question, which are governed by considerations of a different character. Mistake of fact either on the part of one party to the transaction, or mutual to both.

The mistake of one party only is attended by different consequences, accordingly as the other party is or is not cognizant of the mistake. Mistake of one party only, not known to the other.

The law judges of an agreement between two persons exclusively from the mutual communications which take place between them. If the terms of the proposal of the one are unambiguous and unmistakeable, and the answer of the other is an unequivocal and unconditional acceptance, the latter is bound, in the absence of fraud or warranty, however clearly he may afterwards make it appear that he was labouring under a mistake in his acceptance of the proposal. He cannot be allowed to escape from the effect of his agreement by merely showing that he understood the terms in a different sense from that which they bear in their grammatical construction and legal effect. If a man will not take reasonable care to ascertain what he is doing, he must bear the consequences.

Nor indeed is it sufficient to resist specific performance for the purchaser to say that he has made a mistake, if the terms of the contract are not ambiguous, and the property has been described in a manner which could not mislead anybody who took reasonable care (a). In a case before Lord Romilly, where the defendant alleged that he had misunderstood the particulars of sale, he said that "If there appears on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then

(y) 1 Fonb. Eq. B. 1, c. 2, s. 7, Story, Eq. Jur. 147—151; *Warner v. Daniels*, 1 Wood & Min. (Amer.) 90, *supra*, pp. 60, 61, 63.

(z) *Willmott v. Barber*, 15 Ch. D. 97.

(a) *Tamplin v. James*, 15 Ch. D. 217.

I do not think it is sufficient for the purchaser to swear that he did make a mistake, or that he did not understand what he was about" (*b*). Where, accordingly, an inn together with a saddler's shop was put up for sale, and at the back of the inn and saddler's shop were two pieces of garden ground not belonging to the vendor, one of which had been for many years occupied with the inn, and the other with the saddler's shop, and which were hardly at all fenced from the premises with which they were occupied, and the purchaser, who was acquainted with the property, and knew the gardens to be occupied along with the inn and saddler's shop, did not look at the plan, but bought in the belief that he was buying the whole of the property in the occupation of the tenants, it was held that he could not resist specific performance, as the description of the property was accurate and free from ambiguity (*c*). So also, on the other hand, where a purchaser believed he was buying and intended to buy the whole of the premises comprised in the particulars of sale, and there was no ambiguity in the particulars of the property sold, it is not competent to the vendor to say merely that he has made a mistake, and did not intend to sell a portion of the property (*d*).

The Court may, however, refuse to enforce specific performance of a contract on the ground of mistake, even in cases where the mistake is purely the mistake of the person against whom relief is sought, and has not been contributed to in any way by the other party to the contract, if in the opinion of the Court a hardship amounting to injustice would be inflicted on the party against whom relief is sought by holding him to his bargain (*e*). Thus specific performance was refused against a vendor who had contracted to sell an estate under the mistake that he was entitled to the purchase money absolutely, whereas, in fact, he was bound to reinvest it in the purchase of other land (*f*). So

(*b*) *Swaissland v. Dearsley*, 29 Beav. 430; approved by Baggallay, L. J. 15 Ch. D. 218.

(*c*) *Tamplin v. James*, 15 Ch. D. 217.

(*d*) *Dyas v. Stafford*, 7 L. R. I. 606.

(*e*) *Tamplin v. James*, 15 Ch. D. 220; *Burrow v. Scammell*, 19 Ch. D. 182; *Dyas v. Stafford*, 7 L. R. I. 605; *Goddard v. Jeffryes*, 51 L. J. Ch. 67.

(*f*) *Howell v. George*, 1 Madd. 1; *Hood v. Oglander*, 34 Beav. 513.

also, where a vendor had offered property for sale by a letter, in which the price was stated to be £1,250, instead of £2,250, and the purchaser accepted the offer by letter, the Court refused to enforce the contract at the price mentioned in the letter, the vendor having given notice of the mistake immediately on discovering it (*g*). So, also, where a man entered into a contract for the purchase of land under the belief that he would be able to build over the whole site, but he subsequently discovered that he would not be able to do so by reason of certain provisions in an Act of Parliament, the Court would not enforce specific performance against him (*h*). So, also, where a man who was employed to bid for one of two distinct estates offered for sale at the same time and place came into the auction room, and after hearing the description of a lot which was perfectly different from that for which he was engaged to bid, kept bidding in a hasty and inconsiderate manner, and ultimately purchased the lot, which, by his own gross mistake, he thought to be the lot for which he was to bid, the Court refused specifically to carry out the sale (*i*). So, also, where a vendor had revoked the authority of the auctioneer as to part of the property, and the auctioneer inadvertently sold the whole, the Court refused specific performance, although the purchaser was justified in believing that he purchased all he claimed by his bill (*k*).

Where the subject of sale was the reversionary estate in land under a lease, and the price was fixed in the contract without any mention of the rent payable under the lease, and the vendor proved his understanding of the contract to have been that the rent was to be paid to him during the term, besides the contract price, it was held that the purchaser could not have specific performance upon any other construction of the contract, and his bill was dismissed, but without prejudice to his legal rights (*l*). So, also, where a mortgagee, having obtained a foreclosure, contracted to sell, subject to a clause in the contract

(*g*) *Webster v. Cecil*, 30 Beav. 62.

(*k*) *Manser v. Back*, 6 Ha. 443.

(*h*) *Bray v. Briggs*, 20 W. R. 962.

(*l*) *Wycombe v. Dennington Hospital*, 1 Ch. 268.

(*i*) *Malins v. Freeman*, 2 Keen,

stating the vendor to be a mortgagee with power of sale, and that the covenants would be restricted accordingly, and the purchaser insisted upon a conveyance under the power of sale in the mortgage, which might have the effect of opening the foreclosure, it was held that the vendor might resist a specific performance in the form claimed, upon the ground that the clause referring to the power of sale was inserted by mistake (*m*).

So, also, a defendant charged with the performance of an agreement to give a lease may show that the stipulation for the tenant to pay the rent, "free from taxes," was omitted from the agreement by mistake (*n*). So where the subject of the lease was a malting, and by mistake the condition was omitted that the lessees should covenant as to the quantity of malt to be made (*o*); and where in offering an agreement for a lease on certain terms, which were accepted, the lessor had omitted by mistake to insert the term that he required a certain sum for a premium (*p*).

So, also, where a description of parcels was prepared by the vendor's solicitor from a previous description, which had been prepared by another solicitor, in the report of a surveyor, and the description turned out to be erroneous as to quantity, the Court would not enforce the sale on the vendor unless the case were one for compensation, and the purchaser would submit to it (*q*). So, also, where a contract for sale includes, by mistake in drawing up the particulars of sale, property not intended to be sold, the Court will refuse to enforce the contract, unless the purchaser consent to take only the property intended to be sold (*r*).

So, also, the Court would not enforce specific performance against a vendor who had contracted to sell at an inadequate price, in ignorance of the report of his agent upon the value,

(*m*) *Watson v. Marston*, 4 D. M. & G. 230.

(*n*) *Joynes v. Statham*, 3 Atk. 388.

(*o*) *Garrard v. Grinling*, 2 Sw. 244.

(*p*) *Wood v. Scarth*, 2 K. & J. 33.

(*q*) *Leslie v. Thompson*, 9 Ha. 268.

(*r*) *Alvanley v. Kinnaird*, 2 Mac. & G. 1.

which the agent had neglected to present (*s*); and against a vendor who had reserved a bidding for the protection of the sale, but his agent had by mistake omitted to bid (*t*). So it seems that specific performance might be successfully resisted by a purchaser who supposed a certain property to be included in his purchase that formed a material inducement for him to make the contract, and which proves, in fact, not to be included (*u*). Nor will the Court compel a man specifically to perform an agreement where the result would be to compel him to commit a breach of a prior agreement with another person (*v*).

When, on the other hand, an estate was put up to auction and bought upon the terms of the purchaser taking the timber at a fixed price, it was held that a mistake of the vendor in valuing the timber was no ground for relief in equity, and that the contract was binding (*x*). So, also, where a man agreed to take a mining lease entitling him to search for and take coal, &c., &c., at a fixed annual rent, upon the supposition that a certain vein of coal existed under the surface; it was held that he was bound to take the lease and pay the rent, although he was unsuccessful in finding the supposed vein of coal, as he had in fact obtained all that he had bargained for, and there had been no representation by the lessor as to the existence of the coal (*y*). So, also, where a man, being desirous of becoming a freeholder in Essex, contracted to purchase a house on the north side of the river Thames, which he supposed to be in that county, but which proved to be in Kent, the contract was held binding, and he was compelled to complete the purchase specifically (*z*).

If the mistake cannot be established without evidence, the Court will allow a defendant an action for specific performance to support a defence founded on this ground by evidence *dehors* the agreement (*a*).

(*s*) *Mortlock v. Buller*, 10 Ves. 292.

(*t*) *Ib.*

(*u*) See *Stapylton v. Scott*, 13 Ves. 426, *per* Lord Erskine.

(*v*) *Willmott v. Barber*, 15 Ch. D. 96.

(*x*) *Griffiths v. Jones*, 15 Eq. 279.

(*y*) *Jeffreys v. Fairs*, 4 Ch. D. 448.

(*z*) *Shirley v. Davis*, cited 6 Ves. 678, 7 Ves. 270.

(*a*) *Manser v. Back*, 6 Ha. 448; *Wood v. Scarth*, 2 K. & J. 33.

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Though the Court may refuse to grant specific performance in the case of mistake where the exercise of the jurisdiction would have the effect of imposing too great a burden on the party who had made the mistake, no case can be found in which the mistaking party has sought for or could derive any advantage beyond the relief from the burden (*b*). In a case where a defendant had agreed to let and the plaintiff had agreed to take premises on a lease, and the plaintiff had gone into possession under the agreement, and laid out money on the premises, and on the title of the defendant being investigated, it was found that he had only a title to the moiety of the premises, he was decreed specifically to perform as much of the contract as he was able to perform with an abatement of one moiety of the rent (*c*).

Mistake of one
party in motive.

When a party is mistaken in his motive for entering into a contract, or in his expectations respecting it, such mistake does not affect the validity of the contract. If a man purchases a specific article, believing that it will answer a particular purpose to which he intends to put it, and it fails to do so, he is not the less on that account bound to pay for it. A mistake by the buyer in supposing that the article bought by him will answer a certain purpose for which it turns out to be unavailable is not a mistake as to the subject-matter of the contract, but is only a mistake as to a collateral fact, and affords him no ground for pretending that he did not assent to the bargain whatever may be his right afterwards to rescind, if the vendor warranted its adaptability to the intended purpose (*d*). His mistake, unless induced by the seller, is immaterial to the validity of the contract. Such is the case of a person buying a horse without a warranty, believing it to be sound or useful for some special purpose, and the horse turns out to be unsound or not equal to the expectation; and such is the case generally of the sale of a specific chattel in its then state and condition without warranty,

(*b*) *Burrow v. Scummell*, 19 Ch. D.
181.

(*c*) *Ib.*

(*d*) *Chanter v. Hopkins*, 4 M. & W.
399; *Ollicant v. Bayley*, 5 Q. B.
288.

which is found to have a latent defect (*e*). Thus, when a sale of oats was made by a sample which the buyer, a trainer of horses, supposed to be old oats, and therefore suitable for his purpose, new oats being unsuitable; and nothing was said at the time about the quality of the oats; it was held that unless the seller understood the buyer to stipulate as to the quality of the oats, the sale was good, although the oats were in fact new, and not suitable for the purpose of the buyer (*f*). So, also, on the other hand, where a sale was made of 100 chests of tea out of a specific cargo warranted to be equal to a sample shown at the time of sale, which the seller then believed to be, but which was not in fact, a sample of the cargo; it was held that he had no right to avoid the contract by giving notice to the buyer of the mistake respecting the sample (*g*).

A mistake as to the person with whom the contract is made may or may not avoid the contract, according to the circumstances of the case. Where the consideration of the person with whom a man thinks he is contracting does not at all enter into the contract, and he would have been equally willing to make the contract with any person whatever as with him with whom he thought he was dealing, a mistake of identity will not prevent the formation of the contract. But when the consideration of the person with whom a man is willing to contract enters as an important element in the contract, as if it be a sale on credit where the solvency of the buyer is the chief motive which influences the assent of the vendor, or where a purchaser buys from one whom he supposes to be his debtor and against whom he would have the right of set off, a mistake as to the person dealt with prevents the contract from coming into existence for want of assent (*h*).

Where a person passes himself off as another (*i*), or falsely represents himself as agent for another for whom he professes to

(*e*) *Sutton v. Temple*, 12 M. & W. 64, per Lord Wensleydale.

(*f*) *Smith v. Hughes*, L. R. 6 Q. B. 597.

(*g*) *Scott v. Littledale*, 8 E. & B. 815.

(*h*) *Mitchell v. Lapage*, Holt, N. P. 253; *Boulton v. Jones*, 2 H. & N. 564; *Smith v. Wheatercroft*, 9 Ch. D. 230; Pothier, Oblig. 19.

(*i*) *Hardman v. Booth*, 1 H. & C. 803; *Cundy v. Lindsay*, 3 App. Ca. 468.

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buy (*k*), and thus obtains the vendor's assent to a sale and even a delivery of goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the person thus deceiving him (*l*).

Party may so conduct himself as to appear to accede to the terms of the other party.

When the mistake is that of one party alone, it must be borne in mind that the general rule of law is that whatever a man's *real* intention may be, if he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, on that belief, enters into a contract with him, the party thus conducting himself would be equally bound as if he had intended to agree to the other party's terms (*m*).

Mistake of one party known to the other.

When the mistake of one party to a contract is known to the other, though it has not been in any way caused by him, there may be cases in which a contract between them founded on the mistake would be void. If, for example, the one party is ignorant of a fact materially affecting the transaction, and the other party is aware of his ignorance, and knew of his intention to contract only with reference to a supposed different state of facts, he is precluded from denying that he understood the contract in the same sense as the other, namely, as conditional on the existence of the supposed state of facts. So, also, if a contract be entered into between two parties for the sale of a ship, and the vendor knew that the purchaser had a different ship in his mind from that intended by the vendor, there would be no contract, for by the rule of law established in *Freeman v. Cooke* (*n*), the vendor would not be in a position to show that he had been induced to act by a manifestation of the buyer's intention different from his real intention. But as a general rule in sales the vendor and purchaser deal at arms' length, each relying on his own skill and knowledge, and each at liberty to impose conditions or exact warranties before giving assent, and each taking upon himself all risks other than those arising from fraud or from the causes against which he has fortified himself

(*k*) *Higsons v. Burton*, 26 L. J. 663; *Smith v. Hughes*, L. R. 6 Q. B. 607, *per* Lord Blackburn, *supra*, 96.

(*l*) *Supra*, pp. 7, 8.

(*n*) 2 Exch. 654, *supra*, p. 96.

(*m*) *Freeman v. Cooke*, 2 Exch.

by exacting conditions or warranties. So that even if the vendor should know that the buyer was purchasing, for instance, cotton goods submitted to his inspection in the mistaken belief that they were made of linen, or if the purchaser should know that the vendor was selling a valuable estate under the mistaken belief that a search for mines under it had proved unsuccessful, neither party could avoid the contract under the supposed error or mistake. The exception to this rule exists only in cases where from the relation between the parties some special duty is incumbent on the one to make full and candid disclosure of all he knows on the subject to the other (*o*). Thus, when a man sold oats by sample without any other representation as to their quality, and the buyer in reliance on his own judgment bought them for old oats which quality only would serve his purpose, as being a trainer of horses, and which in fact the seller knew them not to be, it was held that the mere passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract, and that there was no legal obligation on the seller to inform the buyer that he was under a mistake not induced by the act of the seller, and that there was no common understanding that the sale was for old oats (*oo*). But it was said (*p*) by Chief Justice Cockburn "that if the buyer had said anything which showed that he was not acting on his own inspection and judgment, but assumed as the foundation of the contract that the oats were old, the silence of the seller as a means of misleading him might have amounted to a fraudulent concealment, such as would have entitled the buyer to avoid the contract."

Where, however, on a sale of goods by sample, the purchaser is aware that the vendor is under a mistake as to the sample he was offering, the vendor would be entitled to say that he had not intended to enter into the contract by which the purchaser sought to bind him (*q*).

When one of the parties to a transaction is aware of a mis-

(*o*) Benjamin on Sale, 374.

(*p*) *Ib.*

(*oo*) *Smith v. Hughes*, L. R. 6 Q.

(*q*) *Ib.*, *per* Hannen, J.

B. 597.

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take of the other in a matter materially inducing it, relief may be had in equity even though no fiduciary relation appear to subsist between the parties, where, under the special circumstances of the case, it appears inequitable that the one party should hold the other to the engagement (*r*). Relief accordingly was given where an instrument had been delivered up under the ignorance of one party and with the knowledge of the other as to a fact upon which the rights attached (*s*).

Mistake of one party known to the other in the expression of the agreement.

If the mistake is in the expression of the agreement, one of the parties cannot in equity hold the other bound to an expression of intention which he knew to be not in accordance with his real intention (*t*). Where, for instance, a man supposes that he has entered into a contract for a lease at one rent, and it turns out that the rent specified in the agreement is of a different amount, the contract will be set aside, unless the party against whom relief is sought shall agree to accept the rent which he knew it was the intention of the plaintiff to give (*u*). So, also, where in a conveyance of messuages, the plan on the deed comprised a piece of land not intended by the vendor to be included, a decree was made to vary the deed, an option being given to the purchaser to have his contract annulled (*x*).

If the mistake of the one party in expressing the agreement be known to the other party at the time, it may be available even at common law in avoidance of the apparent contract, so long as the evidence remains open and is not excluded by a written contract, for, as a general rule, a party cannot hold the other to an expression of terms which he knows at the time are agreed to under a mistake and not in accordance with the real intention (*y*). The doctrine has been stated as follows by Mr. Justice Hannen in *Smith v. Hughes* (*z*): "The promisor is not bound to fulfil a promise in a sense in which the promisee

(*r*) *East India Co. v. Donald*, 9 Ves. 275. 9 Eq. 80.

(*s*) *Ib.*

(*t*) *Garrard v. Frankel*, 30 Beav.

445.

(*u*) *Ib.* See *Worsley v. Frank*, 11 L. T. 392; *Young v. Halahan*, 1 R.

(*x*) *Harris v. Pepperell*, 5 Eq. 1. See *Young v. Halahan*, 1 R. 9 Eq.

80.

(*y*) Leake on Contracts, 317.

(*z*) L. R. 6 Q. B. 610.

knew at the time the promisor did not intend it; and in considering the question in what sense a promisee is entitled to enforce the promise, it matters not in what way the knowledge of the meaning in which the promisor made it is brought to the mind of the promisee, whether by express words, or by conduct, or by previous dealings, or by other circumstances. If by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent."

If the other party to the contract has caused the mistake, different considerations arise according to the circumstances of the case. If he has caused the mistake by misrepresentation intentionally and for the purpose of inducing the contract, it is a fraud, and the contract may be avoided on that ground (*a*). Mistake caused by misrepresentation.

In *Torrance v. Bolton* (*b*), it was held that where a bidder at an auction was misled by the particulars advertised, as to the property exposed for sale, and being deaf did not hear the conditions read out at the sale in which the property was stated to be subject to mortgages, he was not bound by the contract made by mistake under such misleading particulars, which had induced him to believe he was buying the absolute reversion of the freehold and not an equity of redemption. No fraud was shown, but the Court said that the description was "improper, insufficient, and not very fair." So, also, in *Andrew v. Aitken* (*c*), when a vendor by his assent to the assumption of the purchaser that the property, the subject of the contract, was not subject to any restrictive agreement, whereas in fact it was so subject, the transaction was set aside on the ground of mistake induced by the vendor.

If he has caused the mistake unintentionally, and with an honest belief in the truth of his representation, the contract is in general absolute, and independent of any mistake or erroneous supposition respecting the qualities and accidents of the article, if the specific article be accurately identified in sub- Mistake caused unintentionally.

(*a*) *Supra*, pp. 15, 16.

(*b*) 8 Ch. 118.

(*c*) 22 Ch. D. 218.

stance, and be not so different in substance from what it was represented to be as to constitute a failure of consideration (*d*).

For example, where a horse is bought under the belief that it is sound, if the sale was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price unless there was a warranty, and even if there was a warranty he cannot return the horse and claim back the whole price, unless there was a condition to that effect in the contract (*e*). Where accordingly new shares were offered by a company and accepted, under the supposition that the company had obtained a contract that required an extension of their business, and in fact the supposed contract proved to be invalid, it was held that the contract to take the shares was absolute and not conditional upon the validity of the supposed contract, for that the mistake did not affect the substance or validity of the shares actually contracted for and accepted, nor did it constitute a failure of consideration (*f*).

No specific performance at suit of party who has caused the mistake.

If a party to the contract has caused the mistake of the other party to the contract by negligence of himself or his agent, or in any manner for which he may be responsible, although unintentionally and without any fraudulent intention, he cannot have specific performance. Where, for example, on a sale by auction the plan annexed to the particulars of the property showed a shrubbery on the western boundary, and the defendant, going to inspect the property before the sale with the plan in his hand, found on the western side a belt of shrubs with an iron fence outside enclosing three ornamental trees, and he then bought the property, believing that the fence was the boundary, but the real boundary was a line of shrubs within the shrubbery and did enclose the trees, the Court held the mistake was increased at least by *crassa negligentia* on the part of the vendor, and dismissed the bill for specific performance (*g*). So, also, where

(*d*) *Supra*, pp. 19—21.

(*e*) *Supra*, p. 18.

(*f*) *Kennedy v. Panama, &c., &c.*,

L. R. 2 Q. B. 587, *supra*, p. 20.

(*g*) *Denny v. Hancock*, 6 Ch. 1.

land was put up for sale according to a plan annexed to the particulars of sale and subject to a condition that no public house should be built upon the estate ; and a purchaser bought, supposing the plan to represent the whole estate, but it omitted to point out a plot reserved by the vendor for the building of a public house ; it was held that as the plan contributed to the mistake of the purchaser, the vendor must either admit the restrictive condition to extend to the plot reserved, or must have his bill for specific performance dismissed, and in either case must pay the costs of the purchaser (*h*). Nor will specific performance be enforced against a purchaser where the conditions of sale are misleading and erroneous (*i*). But when a man bought a house described as 39, Regency Square, Brighton, without any previous inspection or enquiry about the situation, it was held that he could not afterwards object to complete the sale upon the ground of having been mistaken in the situation of the house, which stood, not in the square, but in the adjoining street, and he was compelled to take the house that was in fact known and identified by that name and description (*j*).

By the general rule of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time it was in a state of preparation, so as to add or subtract from, or in any manner to vary or qualify the written contract (*k*). A Court of equity, however, admits such evidence, whether the purpose of the action be to rectify or rescind an agreement (*l*). Parol evidence is admitted, not to contradict the form of the agreement, which cannot be allowed, but to prove a mistake therein which cannot otherwise be proved (*m*). But the Court will not act upon such evidence, unless the proof be clear and conclusive. In all cases where such evidence is given, great at-

Parol evidence
admissible in
equity in cases
of mistake.

(*h*) *Buscomb v. Beckwith*, 8 Eq. 738.

100. See *Andrew v. Aitken*, 22 Ch. D. 218, *supra*, p. 489.

(*i*) *Harnett v. Baker*, 20 Eq. 50 ;
Jones v. Rimmer, 14 Ch. D. 592, *per*
Jessel, M. R.

(*j*) *White v. Bradshaw*, 16 Jur.

(*k*) *Goss v. Lord Nugent*, 5 B. &
Ad. 58.

(*l*) *Bentley v. Mackay*, 4 D. F. & J.
279 ; *Garrard v. Frankel*, 30 Beav.
451.

(*m*) *Baker v. Paine*, 1 Ves. 457.

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tention will be paid to what is stated by the other party to the instrument (*n*).

Mistake of fact
common to both
parties.

The mistake may be common to both parties to a transaction, and may consist either in the expression of their agreement, or in some matter inducing or influencing the agreement, or in some matter to which the agreement is to be applied.

The rule at law is that an agreement cannot be varied by external evidence, and that the parties are bound by the document, which they have signed and accepted as their agreement (*o*), unless there be error on the face of it so obvious as to leave no doubt of the intention of the parties, without the assistance of external evidence.

In expression
of agreement.

If the parties have expressed themselves in language so vague and unintelligible that the Court finds it impossible to affix a definite meaning to their agreement, it cannot take effect and is void (*p*). So, also, if there be on the face of the instrument what is called a patent ambiguity, that is, a doubt or uncertainty appearing in the terms of the agreement as expressed by themselves, it cannot be altered or explained by extrinsic evidence; and if it is incapable of a rational interpretation, the agreement at least to the extent of the ambiguity is necessarily void (*q*).

Where the mistake in the expression of a written contract is obvious upon the face of the instrument so as to leave no doubt of the intention of the parties without extrinsic evidence to explain it, the mistake is corrected as a mere matter of construction, and the contract is construed in accordance with the obvious intention, both at law and in equity (*r*). Where, for example, a bond was drawn binding the obligor in 7700, without adding any denomination, and the condition was for the payment of a sum of — pounds sterling, the Court supplied the word "pounds" in the bond (*s*). So, also, a bond conditioned to

(*n*) *Bentley v. Mackay*, 4 D. F. & J. 279; *McKenzie v. Coulson*, 8 Eq. 375; *Bloomer v. Shittle*, 13 Eq. 429, *infra*, p. 500.

(*o*) *Hitchin v. Groom*, 5 C. B. 515.

(*p*) *Guthing v. Llyn*, 2 B. & Ad. 232.

(*q*) See *Coles v. Hulme*, 8 B. & C. 568; *Abler v. Boyle*, 4 C. B. 635.

(*r*) See 10 Co. 133 a.; *Osborne's Case*, *Bird's Trust*, 3 Ch. D. 214; *Burchell v. Clark*, 2 C. P. D. 88.

(*s*) *Coles v. Hulme*, 8 B. & C. 568. See *Phipps v. Tanner*, 5 C. & P. 488.

pay instalments until the full sum of "one pounds" should be paid, was construed, according to the context, to mean "one hundred pounds" (*t*). So, also, where the condition of a bond was expressed to be that in the events specified "the condition" of this obligation, instead of "this obligation" to be void, the phrase was read as corrected (*u*). So where the condition of a bond was written that it should be void if the obligee did "not" pay, the Court read the bond without the word "not" (*x*). So, also, a promissory note, dated 1st January, 1854, payable two months after date, and bearing a contemporaneous memorandum by the drawer that it was due 1st March, 1855, was read with the date corrected to 1st January, 1855, on which day it appeared by the evidence to have been made (*y*). So where a date 1806 was obviously written by mistake for 1876 (*z*). So, also, where in a series of deeds relating to the same transaction, £1,200 was in one instance written instead of £1,400, the Court read it correctly without a suit to rectify the mistake (*a*).

So, also, where in a submission to arbitration the words "shall appoint" were obviously omitted in giving time to enlarge the time for the award, these words were read as supplied (*b*); and in a marriage settlement of real estate, in which the word "heirs" had been obviously omitted throughout, the deed was rectified by supplying that word wherever it was necessary for the limitation of the intended estates (*c*). So, also, an omitted life estate (*d*), and a clause giving to children of one daughter an interest similar to that given to children of other daughters (*e*), has been supplied by reference to the context.

Where it is manifest upon the face of an instrument that one name has been written in mistake for another, the Court will

(*t*) *Wauagh v. Bussell*, 5 Taunt. 538.
707.

(*u*) *Mauler v. Hawesby*, 2 Will. Saund. 78, the words might be rejected as surplusage; ib. See *Avory v. White*, 1 Lord Raym. 38.

(*x*) *Wilson v. Wilson*, 5 H. L. 67, per Lord St. Leonards.

(*y*) *Fitch v. Jones*, 5 E. & B. 238.

(*z*) *Lamb v. Bruce*, 45 L. J. Q. B.

(*a*) *Scholefield v. Lockwood*, 32 Beav. 436.

(*b*) *Kirk v. Unwin*, 20 L. J. Exch. 345.

(*c*) *Bird's Trusts*, 3 Ch. D. 214.

(*d*) *Greenwood v. Greenwood*, 5 Ch. D. 955.

(*e*) *Redfern v. Bryning*, 6 Ch. D.

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read the instrument with the mistake corrected (*f*). So where the name of the grantor was omitted in the operative part of a deed, or where the name of the obligee was omitted in a bond, it was supplied from the other parts of the instrument (*g*).

So the Court may presume from the mere inspection of a settlement that words which, though they make sense, give a result which is unreasonable and repugnant to the general intention and to the usual frame of such instruments, were inserted by mistake (*h*).

However general the words of a covenant may be, if standing alone, yet if, from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words (*i*).

Similarly the effect of general words of conveyance is confined to property of the same kind with that which has been specifically described and conveyed (*k*). Where there is a specific description of a particular kind of property followed by words which *primâ facie* would be sufficient to include other property of the same kind, it has been held that those words do not include the property not specifically described on the principle *expressio unius est exclusio alterius* (*l*).

A lease after covenants of the lessee to pay rent, and not to assign without licence, provided for a right of re-entry by the lessor, if any of the covenants "hereinafter contained," on the part of the lessee should be broken. There were no covenants thereafter contained on the part of the lessee; the Court in construing the lease refused to reject the words "hereinafter contained" (*m*).

(*f*) *Spyve v. Topham*, 3 East, 115;
Queen v. Wooldale, 6 Q. B. 563;
Wilson v. Wilson, 5 H. L. 66, per
Lord St. Leonards.

(*g*) *Langdon v. Goole*, 3 Lev. 21;
Lord Say & Sele's Case, 10 Mod. 46;
Dent v. Clayton, 33 L. J. Ch. 503.
See *Young v. Smith*, 1 Eq. 183.

(*h*) *De la Touche's Settlement*, 10
Eq. 603.

(*i*) *Hesse v. Stevenson*, 3 B. & P.
574.

(*k*) *Rooke v. Kensington*, 2 K. & J.
771.

(*l*) *Denn v. Wilford*, 8 Dow. & Ry.
549.

(*m*) *Doe v. Godwin*, 4 M. & S. 265.
Though it was plain there was a
mistake somewhere, it was not certain
whether it was in the insertion of

Upon this principle, where an obvious mistake appears in applying the contract to the facts, the instrument will be construed and applied according to the manifest intention of the parties (*n*); as where an agreement dated 24th October, referred to a bill of exchange "payable at three months from this date," and it appeared that the only bill applicable was dated 25th October, it was held that the bill was sufficiently identified and referred to (*o*).

So where a lease was executed for a term stated in the *habendum* to be for ninety-four years, and the *reddendum* stated the rent to be payable "during the said term of ninety-one years hereby demised," and the counterpart of the lease stated the term in the *habendum* to be ninety-one years; the Court construed the documents together as intending a lease for ninety-one years only, so as to entitle the lessor to recover possession against an assignee of the lessee, who claimed to hold under the lease for a term of ninety-one years (*l*).

So, also, in construing an Act of Parliament, a word that makes a passage unintelligible may be altogether struck out (*q*).

The defence that the contract sought to be enforced is not in conformity with the real agreement between the parties, but has been drawn up incorrectly by mistake, may be set up by parol evidence in answer to an action for specific performance (*r*). If the defendant can show that the instrument does not represent the real agreement between the parties, the plaintiff cannot have specific performance, unless he consent to the variation as set up by the defendant. If the plaintiff will not accept specific performance with the variation as set up and proved by the defendant, his action will be dismissed (*s*); and

these words, or in the omission of the subsequent covenants. *Ib.*, per Bayley, J.

(*n*) Leake on Contracts, 329.

(*o*) *Way v. Hearn*, 13 C. B. N. S. 292.

(*p*) *Burchell v. Clarke*, 2 C. P. D. 88.

(*q*) *Stone v. Yeovil*, 1 C. P. D. 691.

(*r*) *Joyes v. Statham*, 3 Atk. 388; *Gurrard v. Grinling*, 2 Sw. 244; *Lord Gordon v. Marquis of Hertford*, 2 Madd. 106.

(*s*) *Joyes v. Statham*, 3 Atk. 388; *Clarke v. Grant*, 14 Ves. 519; *Ramsbottom v. Gosden*, 1 V. & B. 165; *London and Birmingham Railway Co. v. Winter*, Cr. & Ph. 57; *Martin*

No specific performance of an agreement incorrectly drawn up except on terms.

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specific performance of the agreement, with the variation proved, may be decreed at the instance of the defendant without a cross action (*t*). Although a defendant may show by parol that the written instrument does not represent the contract between the parties, a plaintiff cannot have a decree for specific performance of a written contract with a variation upon parol evidence, for the Statute of Frauds is a bar to the relief (*u*). Parol evidence is admissible on the part of the party resisting specific performance, not to vary the terms of the agreement, but to show that it is unconscionable in the plaintiff to seek specific performance, without submitting to the variation set up and proved by the other (*x*).

Rectification of agreement on the ground of mistake.

If parties enter into an agreement, but there is an error in the reduction of the agreement into writing, so that the written instrument fails through some mistake of the draftsman, either in matter of law (*y*) or of fact, to represent the real agreement of the parties, or omits or contains terms or stipulations contrary to the common intention of the parties, a court of equity will correct and reform the instrument, so as to make it conformable to the real intent of the parties (*z*). So, also, if a conveyance, executed for the purpose of giving effect to and executing an agreement, should by mistake give the purchaser less than the agreement entitled him to, he may call on the Court to rectify the defective conveyance, and give him all that the agreement comprehended (*a*). The principle upon which the Court acts

v. *Pycroft*, 2 D. M. & G. 785; *Fallon* 524.

v. *Robins*, 16 Ir. Ch. 428; *Smith v. Wheatcroft*, 9 Ch. D. 223.

(*t*) *Fife v. Clayton*, 13 Ves. 546.

(*u*) *Woollam v. Hearn*, 7 Ves. 211; *Clinan v. Cooke*, 1 Sch. & Lef. 22, 39; *Squire v. Campbell*, 1 M. & C. 459, 480, per Lord Cottenham; *Att.-Gen. v. Sitwell*, 1 Y. & C. 559; *Davies v. Fitton*, 2 Dr. & War. 225; *Manser v. Buck*, 6 Ha. 443, 447; *Wilson v. Wilson*, 5 H. L. 65, per Lord St. Leonards; but see Fry on Specific Performance, 350—353.

(*x*) *Clowes v. Higginson*, 1 V. & B.

(*y*) *Wake v. Harrop*, 1 H. & C. 202.

(*z*) *Beaumont v. Bramley*, T. & R. 41; *Ashhurst v. Mill*, 7 Ha. 502; *Murray v. Parker*, 19 Beav. 308; *Malmesbury v. Malmesbury*, 31 Beav. 407; *Scholefield v. Lockwood*, 32 Beav. 436, 33 L. J. Ch. 106; *Druff v. Parker*, 5 Eq. 137; *De la Touche's Settlement*, 10 Eq. 600; *Cogan v. Duffield*, 20 Eq. 789; *Re Bird's Trust*, 3 Ch. D. 214; *Welman v. Welman*, 15 Ch. D. 570.

(*a*) *Monro v. Taylor*, 3 Mac. & G.

in correcting instruments, is, that the parties are to be placed in the same situation as they would have stood in, if the error to be corrected had not been committed. When a deed as drawn up goes beyond the instructions and intention of the parties, it will be rectified (*b*). The fact that a provision inserted in a settlement (*e.g.*, a restraint on anticipation of the income of the wife's property) is in itself usual, and is generally considered proper, is not a ground for the Court to refuse to strike it out where its insertion is shown to have been contrary to the desire of the parties and the instructions given by them (*c*). Relief upon a defective instrument is the more readily afforded, when the party to be charged thereon is himself the person who prepared or perfected it (*d*). The fact, however, that the defective instrument may have been drawn up by the party seeking relief is immaterial, if a proper case be made out (*e*). It is, moreover, immaterial to the exercise of the jurisdiction that the instrument sought to be rectified was made under an order of the Court (*f*).

A person, however, who seeks to rectify an instrument, on the ground of mistake, must be able to prove not only that there has been a mistake, but must be able to show exactly and precisely the form to which the deed ought to be brought, in order that it may be set right, according to what was really intended, and must be able to establish in the clearest and most satisfactory manner, that the alleged intention of the parties to which he desires to make it conformable, continued concurrently in the minds of all parties down to the time of its execution. The evidence must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties (*g*). If, upon a personal

718 ; *Leuty v. Hillas*, 2 D. & J. 120, 218.

4 Jur. N. S. 1167 ; *White v. White*, 15 Eq. 249.

(*b*) *Walker v. Armstrong*, 8 D. M. & G. 544.

(*c*) *Torre v. Torre*, 1 Sm. & G. 518.

(*d*) *Ex parte Wright*, 19 Ves. 257 ; *Collett v. Morrison*, 9 Ha. 176.

(*e*) *Bull v. Storie*, 1 Sim. & St.

(*f*) *Smith v. Iliffe*, 20 Eq. 666.

(*g*) *Lord Townshend v. Stangroom*, 6 Ves. 334 ; *Beaumont v. Bramley*, T. & R. 41, 50 ; *Marquis of Breadalbane v. Marquis of Chandos*, 2 M. & C. 740 ; *Rooke v. Lord Kensington*, 2 K. & J. 764 ; *Fowler v. Fowler*, 4 D. & J. 265 ; *Earl of Bradford v. Earl*

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agreement for a life assurance, a policy be drawn by the insurance office in a form which differs from the terms of the agreement, and varies the rights of the parties assured, equity will interfere and deal with the case on the footing of the agreement, and not on that of the policy (*h*). If it appear that there was a change of intention, by which the circumstance that the instrument does not follow the terms of the original contract might be explained, there can be no rectification (*i*); so also if it appear that the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument (*k*). There can be no rectification, if the mistake be not mutual or common to all parties to the instrument (*l*), or if one of the parties knew of the mistake at the time he executed the deed. Where one party only has been under a mistake, while the other, without fraud, knew what the character of the deed was, and intended that it should be, the Court cannot interfere, for otherwise it would be forcing on the latter a contract he never entered into, or depriving him of a benefit he had *bonâ fide* acquired by an executed deed. Rectification can only be had where both parties have executed an instrument under a common mistake, and have done what neither of them intended (*m*). A mistake on one side may be a ground for rescinding, but not for correcting or rectifying an agreement (*n*).

In a case where the plaintiff negotiated the terms of an insurance upon the life of a person with the agent of a company, but a mistake was made in drawing up the terms of the resulting proposal, which was forwarded to the company; and the

of *Romney*, 30 Beav. 431; *Bentley v. Mackay*, 4 D. F. & J. 279; *Sells v. Sells*, 1 Dr. & Sm. 42; *McKenzie v. Coulson*, 8 Eq. 375.

(*h*) *Collett v. Morrison*, 9 Ha. 162.

(*i*) *Marquis of Breadalbane v. Marquis of Chandos*, 2 M. & C. 740.

(*k*) *Bentley v. Mackay*, 4 D. F. & J. 279.

(*l*) *Rooke v. Lord Kensington*, 2 K.

& J. 753; *Fowler v. Fowler*, 4 D. & J. 265; *Sells v. Sells*, 1 Dr. & Sm. 42; *Re Walsh*, 15 W. R. 1117.

(*m*) *Eaton v. Bennett*, 34 Beav. 196; *Fullon v. Robins*, 16 Ir. Ch. 422.

(*n*) *Mortimer v. Shortall*, 2 Dr. & War. 372; *Fowler v. Fowler* 4 D. & J. 265; *Re Walsh*, 15 W. R. 1117.

proposal in the terms sent was accepted by the company, and the policy was granted accordingly ; and the person afterwards died under circumstances which, in consequence of the mistake, were not within the policy ; the Court refused to rectify the policy according to the intention of the insured, as there was no mistake on the part of the company in granting it (*o*). So, also, where an underwriter had executed a policy of insurance upon a cargo in general terms, it was held, upon an application by him to rectify the policy, that it was not competent for him to allege that the words " free of particular average," inserted in the slip, had been omitted by mistake in the policy, the insured denying that he intended or would have accepted a policy on such terms, and the slip being held to be a mere matter of preliminary negotiation, and that the policy was valid as it stood (*oo*). In a case where in a conveyance of land, a reservation of minerals to the vendor was inserted by a mistake, common to both parties, as the purchaser alleged, though denied by the vendor in his answer, who died before cross-examination, the Court, being of opinion that the mistake was, as the purchaser alleged, common to both parties, gave the representatives of the vendor the option to have the conveyance rectified, or to have the whole transaction set aside, and ordered that in the event of the purchaser not choosing to have the transaction set aside, the action should be dismissed without costs (*p*).

In *Harris v. Pepperell* (*q*), Lord Romilly, M.R., said that the rule that the Court will not rectify an instrument on the ground of mistake, except the mistake be mutual, is liable to an exception in a case between vendor and purchaser. But the distinction is not supported by the authorities, and does not seem sound. *Garrard v. Frankel* (*r*), and *Harris v. Pepperell* (*s*), were, there is no reason to doubt, correctly determined ; but the

(*o*) *Fowler v. Scottish Equitable* mistakenly excluded.

Insurance Co., 28 L. J. Ch. 225. (*oo*) *McKenzie v. Coulson*, 8 Eq. 368.

The Court however set aside the policy, and ordered a return of the premiums as having been paid by mistake. This does not seem equitable, as the company had incurred the risk in all other events than that

(*p*) *Bloomer v. Spittle*, 13 Eq. 428.

(*q*) 5 Eq. 1.

(*r*) 30 Beav. 451.

(*s*) 5 Eq. 1.

principle upon which they are to be upheld is that the Court in these cases merely abstained from setting the agreement aside on the consent of the defendant to submit to the variation alleged by the plaintiff (*t*). In cases of rectification, properly so called, the Court does not put it to the defendant to submit to the variation alleged by the plaintiff, but makes the instrument conformable to the intent of the parties without any such offer or submission.

Although, however, the Court will not rectify a transaction between two or more parties, unless on the ground of mutual mistake, a deed poll by way of appointment may be rectified on the ground of mistake, if the mistake is clearly proved on the part of the person making it (*u*).

Parol evidence is admissible on the application to rectify an instrument to show what the intention of the parties really was (*x*), even although the contract be one required by the Statute of Frauds to be proved by writing (*y*). In most, if not in all, the cases in which the Court has reformed an instrument, there has been something beyond the parol evidence, such, for instance, as a rough draft of the agreement, written instructions for preparing it or the like, but the Court will act where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach (*z*). If, however, there is not anything in writing beyond the parol evidence to go by, and the defendant by his answer denies the case set up by the plaintiff, the plaintiff will often be without a remedy, though even in such cases the parol evidence may be so conclusive as to justify the Court in granting the relief prayed (*a*).

(*t*) See *Bloomer v. Spittle*, 13 Eq. 429; *Young v. Halohan*, 1. R. 9 Eq. 80.

(*u*) *Wright v. Goff*, 22 Beav. 214; *Wilkinson v. Nelson*, 7 Jur. N. S. 481; *Killick v. Gray*, 46 L. T. N. S. 583.

(*x*) *Alexander v. Crosbie*, Ll. & G. temp. Sug. 145; *Mortimer v. Shortall*, 2 Dr. & War. 363; *Barrow v. Barrow*, 18 Beav. 532; *Lackersteen v.*

Lackersteen, 6 Jur. N. S. 1111.

(*y*) *Re Boulter*, 4 Ch. D. 241.

(*z*) *Alexander v. Crosbie*, Ll. & G. 149; *Mortimer v. Shortall*, 2 Dr. & War. 373; *Smith v. Iliffe*, 20 Eq. 666; *Hanley v. Pearson*, 13 Ch. D. 545; *Welman v. Welman*, 15 Ch. D. 570; *Cook v. Fearn*, 48 L. J. Ch. 63; *Edwards v. Bingham*, 28 W. R. 89; *Cordeaux v. Fullerton*, ib. 320.

(*a*) *Ib.*; *Beaumont v. Bramley*, T.

A settlement may be rectified even against previous articles on the settlor's uncontradicted evidence of departure from the real intention, if no further evidence can be obtained (*b*).

If the original agreement is of doubtful construction, and the conveyance is definite and unequivocal, it is not easy to avoid the conclusion that the latter may be the best evidence of the terms of the actual agreement (*c*).

Where a document has been signed as an agreement in a common mistake as to its contents, and it appears that no real agreement was come to between the parties according to which it might be rectified, the Court will set it aside (*d*). "Courts of equity," said James, L. J., in *McKenzie v. Coulson* (*e*), "do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified, and that such contract is inaccurately represented in the instrument. It is impossible for the Court to rescind or alter a contract with reference to the terms of the negotiation which preceded it." There can be no rectification, if one of the contracting parties never heard of that which is said to be the real agreement (*f*).

Where the instrument sought to be rectified on the ground of mistake was a marriage settlement the doctrine in the older cases was that where the articles and settlement were both before marriage, the Court would not interfere unless the settlement was expressed to be made in pursuance of the articles, for, without such a recital, the Court supposed that the parties had altered their intentions as regarded the terms of the contract (*g*).

& R. 52; *Fowler v. Fowler*, 4 D. & J. 273; *Bentley v. Mackay*, 4 D. F. & J. 279; *De la Touche's Settlement*, 10 Eq. 600; *Bloomer v. Spittle*, 13 Eq. 430; *McCormack v. McCormack*, 1 L. R. 1. 124.

(*b*) *Smith v. Hiff*, 20 Eq. 666; *Hanley v. Pearson*, 13 Ch. D. 545.

(*c*) *Humphries v. Horne*, 3 Ha. 277.

(*d*) *Culverley v. Williams*, 1 Ves.

Jr. 210; *Price v. Ley*, 4 Giff. 235, aff. 11 W. R. 475; *Fowler v. Scottish Equitable Life Assurance Society*, 28 L. J. Ch. 228.

(*e*) 8 Eq. 375.

(*f*) *Fowler v. Scottish Equitable Life Assurance Society*, 28 L. J. Ch. 228.

(*g*) *Bold v. Hutchinson*, 5 D. M. & G. 566.

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The later authorities, however, dispense with the necessity of a reference to previous articles in the settlement (*h*). Where a settlement purports to be in pursuance of articles entered into before marriage, and there is any variance, then no evidence is necessary to have the settlement corrected; and although the settlement contains no reference to the articles, yet if it can be shown that the settlement was intended to be in conformity with the articles, and there is clear and satisfactory evidence, showing that the discrepancy had arisen from a mistake, the Court will reform the settlement, and make it conformable to the real intention of the parties (*i*).

Though the limitations in a post-nuptial settlement purporting to be made in pursuance of articles may agree with the words of the articles, if it does not carry out their intent, the Court will reform it, and will, so far as is consistent with the articles, construe them so as to make such a settlement as is generally approved by the Court, and will supplement the articles accordingly (*k*).

Where shares have not been registered in accordance with sect. 25 of the Companies Act, 1867, and the mistake is common to the directors and the allottee, the Court will rectify the instrument when it is for the common benefit of the parties that the mistake should be rectified, whether it be a mistake in law or in fact (*l*). So, also, where a transfer of certain shares was executed in which the shares were wrongly numbered by mistake, it was held that the transfer was substantially valid so as to render the transferee a shareholder, and that the numbers might afterwards be rectified (*m*). So, also, where a man purchased land of a building society under an arrangement that he should mortgage it to the society to secure the purchase-money, but the deeds were drawn and executed in mistake as representing an advance of money to a member with covenants

(*h*) *Bold v. Hutchinson*, 5 D. M. & G. 566.

(*i*) *Ib.* 568; *King v. King-Harman*, 1. R. 7 Eq. 447.

(*k*) *Cogan v. Duffield*, 2 Ch. D. 49.

(*l*) *Re Denton Colliery Co.*, 18 Eq.

16; *Re New Zealand Co.*, *ib.* 17 n. The directors have power under similar circumstances to rectify the instrument. *Hartley's Case*, 10 Ch.

157.

(*m*) *Ind's Case*, 7 Ch. 485.

to make all payments in respect of his shares, it was held on the liquidation of the society that he could not be charged as a member under the deeds, but must be charged according to the real transaction (*n*). So, where a bill of exchange drawn in renewal of a former bill between an indorser, drawer, and indorsee had by mistake the name of the indorsee inserted in the place of the drawer, in which form the bill was accepted and indorsed to him, and in an action by the intended indorsee against the drawer, the latter relied in defence upon the apparent form of the bill, the Court entertained a bill for rectifying the instrument (*o*).

So, also, where an agreement was made for the insurance of a ship beginning the risk *at* and *from* a named port, and the policy was by mistake drawn out for the risk *from* the port only, the policy was corrected so as to entitle the assured to recover for a loss *at* the port (*p*). So, under an open policy of assurance upon goods to be declared as shipped in order of shipment, it was held that the insured might, according to the usage of merchants and underwriters, correct a mistake in the order of declaring the shipments after a loss had become known, so as to bring the goods within the insurance according to the true order (*q*).

In some cases where the fact of the mistake can be fairly implied from the nature of the transaction, relief will be given although the fact of the mistake is not established by direct evidence. Thus, in cases where there has been a joint loan of money to two or more obligors, and they are by the instrument made jointly liable, but not jointly and severally, the Court has reformed the instrument and made the obligation joint and several so as to charge the estate of a deceased obligor, upon the reasonable presumption from the nature of the transaction that it was so intended by the parties (*r*). The debt being

Rectification in certain cases, though mistake is not shown by direct evidence.

(*n*) *Empson's Case*, 9 Eq. 597.

(*o*) *Druiff v. Parker*, 5 Eq. 131.

(*p*) *Motteux v. London Assurance Co.*, 1 Atk. 545.

(*q*) *Stephens v. Australasian Insurance Co.*, L. R. 8 C. P. 18.

(*r*) *Simpson v. Vaughan*, 2 Atk.

31, 32; *Bishop v. Church*, 2 Ves.

100, 371; *Thomas v. Frazer*, 3 Ves.

399; *Underhill v. Horwood*, 10 Ves.

227; *Deraynes v. Noble, Steech's*

Case, 1 Mer. 564; *Thorpe v. Jackson*,

2 Y. & C. 553.

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joint, the natural if not the irresistible inference in such cases is that it is intended by all parties that in every event the responsibility should attach to each obligor and to all equally. This can be done only by making the bond several as well as joint; for otherwise, in case of the death of one of the obligors, the survivor or survivors only would be liable at law for the debt (s). Indeed, it is now well established, as a general principle, that every contract for a joint loan is in equity to be deemed, as to the parties borrowing, a joint and several contract, whether the transaction be of a mercantile nature or not; for in every such case it may fairly be presumed to be the intention of the parties that the creditor should have the several as well as the joint security of all the borrowers for the payment of the debt (t). Hence, if one of the borrowers should die, the creditor has a right to proceed for immediate relief out of the assets of the deceased party, without claiming any relief against the surviving joint contractors, and without showing that the latter are unable to pay by reason of their insolvency (u).

But where the inference of a joint original debt or liability is repelled a court of equity will not interfere; for in such a case there is no ground to presume a mistake. The doctrine has been thus stated by Sir W. Grant in *Sumner v. Powell* (x): "Where the obligation exists only in virtue of a covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner, although at law it is only the joint debt of all. But then all the partners have had a benefit from the money or the credit given; and the obligation of all to pay exists independently of any instrument by which the debt may have been secured. So, where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It is not the bond that first created the liability."

It is upon the same ground that a court of equity will not

(s) *Gray v. Chiswell*, 9 Ves. 118; (u) *Ib.*; *Williamson v. Henderson*,
Ex parte Kendall, 17 Ves. 525. 1 M. & K. 582.

(t) *Thorpe v. Jackson*, 2 Y. & C. (x) 2 Mer. 36.

reform a joint bond against a mere surety, so as to make it several against him upon the presumption of a mistake from the nature of the transaction, but it will require positive proof of an express agreement by him that it should be several as well as joint (*y*). So, where an obligee of a joint and several bond elected to take a judgment against all the obligors, and thus at law lost his right of a several remedy, a court of equity refused him a remedy against the personal assets of a deceased obligor, who was only a surety (*z*). So, also, in cases where the obligation or covenant is purely matter of arbitrary convention, not growing out of any antecedent liability in all or any of the obligors or covenantors to do what they have undertaken (as, for example, a bond or covenant of indemnity for the acts or debts of third persons), a court of equity will not by implication extend the responsibility from that of a joint to a joint and several undertaking (*a*). But if there be an express agreement to the effect that an obligation or other contract shall be joint and several, or to any other effect, and it is omitted by mistake in the instrument, a court of equity will under such circumstances grant relief as fully against a surety or guarantee as against the principal party (*b*).

The equity for rectification on presumptive evidence is applied also to a mortgage by husband and wife of the wife's estate, which has limited the equity of redemption to the husband. If the instrument does not recite an intention to do more than make a mortgage, the presumption is that nothing more was intended; and the instrument will be reformed by restoring the equity of redemption to the wife. And, in like manner, it is held that if a lease be made by a tenant for life under a power created by a settlement, and a rent reserved to the lessor and his heirs, these words shall be interpreted by the prior title, and applied to the remainderman under the settlement, and not the heir of the lessor (*c*).

(*y*) 2 Mer. 36; *Rawstone v. Parr*, 3 Russ. 539.

(*z*) *United States v. Price*, 9 How. (Amer.), 83.

(*a*) *Sumner v. Powell*, 2 Mer. 36, 37; *Clarke v. Bickers*, 14 Sim. 639.

(*b*) *Crosby v. Middleton*, Prec. Ch. 309, 2 Eq. Ca. Ab. 188; *Sumner v. Powell*, 2 Mer. 36; *Rawstone v. Parr*, 3 Russ. 539.

(*c*) *Innes v. Jackson*, 1 Bligh, 104, 114; *Clark v. Buryh*, 2 Coll. 221.

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Cases in which there can be no rectification of an instrument.

The principle upon which the Court reforms and corrects an instrument on the ground of mistake will not apply in a case in which a matter has been completely overlooked on both sides; and the agreement is a substantial agreement which speaks in sufficiently clear terms for itself, and contains no reference to any other instrument or to any pre-existing relation (*d*); or in a case where the instrument is in accordance with the expressed intention of the parties, and has been prepared with full knowledge of their rights, but has failed only because the parties have been ill-advised as to the way of giving effect to their intention (*e*). Nor will the Court make a settlement conformable with what it is alleged it would have been if all the material points had been present to the minds of the parties at the time they executed it (*f*). Nor will the Court, under the name of rectification, add to the agreement a term which had not been determined upon, or was not agitated between them. There can be no rectification if the agreement executed is in accordance with the proposals (*g*). Nor can there be rectification, if it was by the intention of the parties that the written instrument did not comprise all the terms of the actual agreement (*h*).

Though the Court will rectify an instrument which fails through some mistake of the draughtsman in point of law to carry out the real agreement between the parties (*i*), it is not sufficient in order to create an equity for rectification that there has been a mistake as to the legal construction or the legal consequences of an instrument. The proper question always is, not what the document was intended to mean, or how it was intended to operate, but what it was intended to be. For example, where an annuity had been sold by the plaintiff, and was intended to be redeemable, but it was agreed that a clause

(*d*) *Parker v. Taswell*, 2 D. & J. 667.

559.

(*e*) *Farr v. Sheriffe*, 4 Ha. 513.

(*f*) *Barrow v. Barrow*, 18 Beav. 534; *Wilkinson v. Nelson*, 7 Jur. N. S. 481. See *Hills v. Rowland*, 4 D. M. & G. 430.

(*g*) *Elwes v. Elwes*, 3 D. F. & J.

(*h*) *Lord Irnham v. Child*, 1 Bro. C. C. 92; *Lord Portmore v. Morris*, 2 Bro. C. C. 219; *Lord Townshend v. Stangroom*, 6 Ves. 332; *Harbidge v. Wogan*, 5 Ha. 258.

(*i*) *Wuke v. Harrop*, 1 H. & C.

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of redemption should not be inserted in the deed, because both parties erroneously supposed that its insertion would make the transaction usurious, it was held that the omission could not be supplied in equity, for the Court was not asked to make the deed what the parties intended, but to make it that which they did not intend, but which they would have intended had they been better informed (*k*). So also where a party making a voluntary deed supposes that he will have a power of subsequent revocation, though no such power is reserved, the deed cannot afterwards be rectified by inserting the power, the evidence merely showing that the power had been omitted under the erroneous belief that it was not necessary to insert it, not that the power was intended to be inserted, but was left out by mistake (*l*).

Nor can there be rectification, although both parties may have been under a mistake, if the mistake be in respect of a matter materially inducing the agreement (*m*).

It is not necessary that a person claiming to have a settlement rectified should be or should represent a party to the original contract, or should be within the consideration of it (*n*). But the Court will not rectify a voluntary deed unless all the parties assent. If any object, the deed must take its chance as it stands (*o*).

A voluntary deed cannot be reformed, except with the consent of the settlor, if it fails to carry out the intention of the parties. If the case be that he has made a mistake, no amount of evidence, however conclusive, proving that he made a mistake, will justify the Court in compelling him to introduce a clause into the deed, which he does not choose to introduce, although at the time of execution he might have wished to have done so (*p*). But if a man executes a volun-

(*k*) *Irnham v. Child*, 1 Bro. C. C. 92; *Townshend v. Stungroom*, 6 Ves. 328.

(*l*) *Worrall v. Jacob*, 3 Mer. 270.

(*m*) *Carpmael v. Powis*, 10 Beav. 36.

(*n*) *Thompson v. Whitmore*, 1 J. & H. 273.

(*o*) *Brown v. Kennedy*, 33 Beav. 133. But the Court has power to set aside a voluntary deed at the suit of the grantor, if he is content that the rest should stand. *Turner v. Collins*, 7 Ch. 342.

(*p*) *Lister v. Hodgson*, 4 Eq. 34.

Rectification of voluntary deed.

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tary deed declaring certain trusts and happens to die, and it is proved from the instructions or otherwise that the deed was not prepared in the exact manner which he intended, the deed may be reformed and those particular provisions necessary to carry his intention into effect may be introduced (*q*). So also a voluntary deed may be set aside after the death of both donor and donee, if there is evidence to show that the donee complained of the deed and took steps to annul it (*r*).

In *Hughes v. Seanor* (*s*) a voluntary deed, by which a father purported to convey his property to his son absolutely, but which did not carry into effect the whole arrangement between them, was set aside at the instance of the father after the son's death.

In *Everitt v. Everitt* (*t*) a voluntary settlement by a young lady just of age, in which no voice was given her in the appointment of new trustees, and there was no power of revocation, and she had no independent legal adviser, was set aside on her application.

Lapse of time a bar to rectification.

Lapse of time may be a bar to the rectification of an instrument (*u*). But in particular cases, if the mistake is clearly made out to the satisfaction of the Court, the lapse of a long period will not be a bar. In *Wolterbeck v. Burrow* (*v*) a marriage settlement dated 1823 was reformed in 1857, after the death of the husband, upon proof that it was not in accordance with the written instructions. So also in *McCormack v. McCormack* (*x*), a marriage settlement drawn up in 1841 was rectified in 1874.

Mode of application for rectification.

The Court will not reform a deed or instrument upon petition except in cases under the Trustee Relief Act (*y*), or upon motion, but only in an action instituted for the purpose; and until a deed is reformed, the Court is bound to act upon it as it exists (*z*).

(*q*) *Lister v. Hodgson*, 4 Eq. 34.

(*r*) 23 Beav. 420.

(*s*) *Philippson v. Kerry*, 32 Beav.

(*x*) 1 L. R. I. 119.

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(*t*) 18 W. R. 1122.

(*y*) *De la Touche's Settlement*, 10 Eq. 600; *Bird's Trust*, 3 Ch. D. 214.

(*u*) 10 Eq. 409.

(*z*) *Re Mahl*, 30 Beav. 407.

(*v*) *Bloomer v. Spittle*, 13 Eq. 429.

Actions for the rectification of instruments must be assigned to the Chancery Division, Judicature Act, 1873, s. 34, but where a statement of defence to an action brought in another division is accompanied by a counter claim for rectification, this is not a sufficient reason for transferring the action (*a*).

Where a conveyance is rectified, the order of the Court is sufficient without a new deed. A copy of the order is endorsed on the deed which is to be rectified. Thus, where a deed was executed purporting by mistake to convey a moiety only of real estate instead of the whole, as the parties intended, the Court held that an order for rectifying the deed indorsed upon it was effectual to pass the legal estate in the whole without a conveyance of the other moiety (*b*). So, where in a memorandum of mortgage, the property, although specifically identified, was misdescribed, the Court held that the document must be treated as rectified and the security operate as intended (*c*).

If parties enter into an agreement conditionally, and in contemplation of or with reference to a supposed actual state of things, and it turn out that, by the mutual mistake of the parties, the supposed actual state of things does not in fact subsist, the consideration for the agreement fails, and the agreement is consequently void as well at law as in equity (*d*). A contract, for instance, for the sale of a cargo, supposed by both parties to be on board a particular ship, is at end if the cargo had at the time ceased to exist (*e*). So also a contract for the sale of an annuity during the life of a person, is conditional upon his being alive at the time of the sale; so that he having previously died, and purchase-money having been paid in ignorance of the fact, the sale is void, and purchaser is entitled to recover back his money (*f*). So also a grant of an annuity upon the statement of the grantor as to the age of the nominee is taken to be made upon the basis of the statement, and if the

(*a*) *Storey v. Waddle*, 4 Q. B. D. 413; *Cooper v. Phibbs*, L. R. 2 App. 289. Ca. 149.

(*b*) *White v. White*, 15 Eq. 247. (*e*) *Couturier v. Hastie*, 9 Exch.

(*c*) *Re Boulter*, 4 Ch. D. 241. 102, 5 H. L. 673.

(*d*) See *Stapylton v. Scott*, 13 Ves. 427; *Robinson v. Dickenson*, 3 Russ. 208. (*f*) *Strickland v. Turner*, 7 Exch.

Order of Court to rectify sufficient without deed.

Mutual mistake in material matters inducing an agreement.

Chap. I.

statement be erroneous, although unintentionally so, the grant is void and the payments can be recovered back (*g*). So also where a policy of insurance was renewed during the days of grace allowed after the expiration of the policy and acceptance of the premiums, both parties being ignorant that the life insured had previously died during the days of grace, it was held that the renewal being conditional upon the insured being then alive, it was void (*h*). So it seems that a time policy on a ship made in ignorance that the ship had then ceased to exist would be held void (*i*), but that a voyage policy made in ignorance that the ship had previously arrived at the port of destination would be taken as insuring the unknown risk (*k*). So also where an agreement was made for the sale of a remainder in fee expectant on an estate tail, and a bond was given to secure the purchase-monies; but it appeared that at the time of the sale the tenant in tail had suffered a recovery and destroyed the remainder, of which both parties were ignorant; the agreement was held void, and the bond was cancelled, upon the ground that the parties had contracted upon the supposition that a recovery had not then been suffered (*l*). So also where an agreement was made between the assignee of the tenant for life of an estate and the person entitled in remainder, respecting the timber on the estate, under the supposition that the tenant for life was then alive and entitled to cut the timber, but he was in fact then dead, it was held that the agreement was void, both in equity and at law (*m*). So also where rent was paid and received for the occupation of land after the expiration of a lease for lives under which it was supposed to be payable in ignorance of the death of the persons upon whose lives the lease depended, it was held that no implication of the creation of a new tenancy could arise from such receipt of rent (*n*). So also where the plaintiff bought a bar

(*g*) *Att.-Gen. v. Ray*, 9 Ch. 397.

(*l*) *Hitchcock v. Giddings*, 4 Pri.

(*h*) *Pritchard v. Merchants' Life Insurance Society*, 3 C. B. N. S. 622.

135. *Comp. Clare v. Lamb*, L. R. 10 C. P. 340.

(*i*) See *Barker v. Janson*, L. R. 3 C. P. 303.

(*m*) *Cochrane v. Willis*, 1 Ch. 58.

(*k*) *Stone v. Marine Insurance Co.*, 1 Exch. D. 81.

(*n*) *Doe v. Crago*, 6 C. B. 90.

of silver and by agreement it was sent to an expert to be assayed, and on his report of the quantity of silver contained in the bar, the plaintiff paid for it; but it was afterwards discovered that there was a mistake in the assay, and that the quantity of silver was much less than was stated in the report; it was held to be a common mistake and that the plaintiff was entitled to recover what he had paid (*o*). So also where a fund was settled on two persons for life with benefit of survivorship between them, and one of them sold his reversionary interest; but it turned out that at the time of the sale the other person was dead, so that the interest, which was supposed to be a reversionary one, had become an interest in possession, and the fact was unknown to both parties, it was held that the sale could not stand (*p*). So also where a party having a claim upon another party, discharged the executors of the latter after his death from all claims, and there was a recital in the deed of release, that the party deceased had before his death possessed himself of a certain fund, which had been set apart to secure the claim, the release was set aside on it turning out that the recital was false, and that the fund had been paid in by him to a bank (*q*). So also where a party had, upon a compromise, executed a general release in respect of partnership matters, it was held that he was entitled to relief, on the ground of a large item in which he was interested having been omitted by mistake in the account (*r*).

So also if the vendor, in fixing the price, has altogether relied on information furnished to him by the purchaser and such information turn out to have been (even unintentionally) incorrect, this may entitle the vendor, even after conveyance, to relief in equity (*s*).

But a contract may be unconditional, although the parties are under a mistake respecting some matter which induces the contract. Thus, if the contract be absolute, and not with reference to collateral circumstances, as, for instance, if a ship on a voyage be sold, and the ship, at the time of the contract, be

(*o*) *Cox v. Prentice*, 3 M. & S. 344.

(*r*) *Pritt v. Clay*, 6 Beav. 503.

(*p*) *Colyer v. Clay*, 7 Beav. 188.

(*s*) *Carpmael v. Powis*, 10 Beav.

(*q*) *Hore v. Becher*, 12 Sim. 465.

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seriously damaged, to the ignorance of both parties, still the contract is valid (*t*). So where a time policy was made upon a ship valued therein at a fixed sum, it was held, although the policy was impliedly conditional upon the existence of the ship at the time of the contract, it was independent of its state of repair, and although the ship, at the time of making the policy, unknown to both parties had been injured, so as to be not worth repairing, yet the policy attached for the full value agreed on (*u*).

So, also, although there be a mutual mistake respecting the subject matter of the agreement, yet if both parties are aware that the subject matter is, from its nature, doubtful or uncertain, or is of a speculative or contingent character, the mistake goes for nothing either at law or in equity. A contract for the sale of a thing, the extent or value of which is understood to be unknown to both parties, or which is, from its nature or character, doubtful or uncertain, is valid and binding (*x*). If a bargain depends on a contingent event, or the subject matter of a contract be an uncertain thing, and the contingency or chance be known to both parties, neither of them can resist specific performance because the reality has turned out to be different from what he anticipated (*y*).

There is mutual mistake which will vitiate a contract, or which at least will render it incapable of being specifically enforced in equity, if the one party does not think he is selling what the other thinks he is buying (*z*).

Care must, however, be taken in distinguishing cases, where the parties are under a mutual mistake as to the subject matter of a contract, from cases where there is no doubt as to the subject matter; but the one has, in fact, sold more than he thought

(*t*) *Barr v. Gibson*, 3 M. & W. 390.

(*u*) *Barker v. Janson*, L. R. 3 C. P. 303.

(*x*) *Mortimer v. Capper*, 1 Bro. C. C. 156; *Ridgray v. Sneyd*, Kay, 627; *Baxendale v. Seale*, 19 Beav. 601. See *Davis v. Shepherd*, 1 Ch. 410.

(*y*) *Mortimer v. Capper*, 1 Bro. C. C. 156; *Baxendale v. Seale*, 19 Beav. 601. See *Monro v. Taylor*, 3 Mac. & G. 718.

(*z*) *Hitchcock v. Giddings*, 4 Pri. 135; *Cochrane v. Willis*, 1 Ch. 58; *Butterworth v. Walker*, 13 W. R. 168; *Baxendale v. Seale*, 19 Beav. 601.

he was selling, and the other has got more than he expected. In such cases relief cannot be had in equity, if there has been no unfairness on either side (*a*). Where, for instance, that which the vendor intended to sell, and the purchaser to buy, was a leasehold interest, erroneously supposed to have a shorter time to run than it in fact had to run, it was held that the vendor had, after conveyance, no equity for relief (*b*). So also where a man entitled to an interest in a residuary estate, assigns all his interest to a creditor, he is not entitled to relief if it afterwards appear that the residuary estate consisted partly of a fund, the existence of which was not known to either of the parties at the time of the execution of the deed (*c*). So also where a lessor agreed to grant an underlease of certain premises for the residue of the term held by him, except the last ten days, and the lessor's solicitor drew up a lease for twenty-three years less ten days, and the lease was executed by the lessee, who did not inspect the original lease, and it was afterwards discovered that the original lease had only sixteen years to run, so that the underlease had by mistake been made for some years longer than the lessor had power to grant, it was held on a claim by the underlessee for compensation that the rule *caveat emptor* applied, and that he had no claim to compensation (*d*).

Nor where several persons have joined in conveying an estate to a purchaser for a full consideration, can one of them be afterwards heard to say that he was under a misapprehension as to the extent of his interest in the property (*e*).

The same considerations which apply to the case of agreements entered into under a mutual mistake of the parties as to fact, apply to the case of compromises. A compromise which is founded on a mutual mistake of fact cannot be supported. If, for instance, a compromise is founded on the genuineness of an

Mistake of fact
in compromises,

(*a*) *Okill v. Whittaker*, 1 Deg. & Ch. D. 829.
Sm. 83, 2 Ph. 338.

(*b*) *Ib.*

(*c*) *Howkins v. Jackson*, 2 Mac. & G. 372. Comp. *Grievson v. Kirsopp*, 5 Beav. 287; *Turner v. Turner*, 14

(*d*) *Besley v. Besley*, 9 Ch. D. 103.

(*e*) *Malden v. Menill*, 2 Atk. 8.

See *Marshall v. Collett*, 1 Y. & C. 232; *Evans v. Jones*, Kay, 29.

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instrument which turns out to be forged, or if a suit which it is the object of a compromise to determine, turns out to have been already decided in favour of one of the parties, or if a compromise be founded on a will, which turns out to have been revoked by another will of which the parties are ignorant, the transaction cannot be supported (*f*). But the case is different if the fact in respect of which there is a mistake be included in the compromise, and be not the very foundation on which the compromise rests (*g*). If one or more parties having, or supposing they have, claims upon a given subject matter, or claims upon each other, agree to compromise those claims, and to come to a general settlement of the matters in dispute between them without resorting to litigation, and they act with good faith, and stand on an equal footing, and have equal means of knowledge as to the facts, the compromise is binding in equity (*h*). It is not enough to invalidate the transaction that one of the parties may have been in error as to a fact included in it. A compromise cannot, however, be supported, unless it is fairly entered into, and after due deliberation (*i*).

The principles which apply to the case of ordinary compromises between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced, if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend (*k*).

(*f*) Toull. Cod. Civ. Liv. 3, tit. 3, c. 2. See *Ashurst v. Mill*, 7 Ha. 502; *Lawton v. Campion*, 18 Beav. 87; *Trigge v. Lavallée*, 15 Moo. P. C. 276.

(*g*) See *Trigge v. Lavallée*, 15 Moo. P. C. 276.

(*h*) *Attwood v. —*, 1 Russ. 353, 5 Russ. 149; *Roche v. O'Brien*, 1 Ba. & Be. 330; *Leonard v. Leonard*, 2 Ba. & Be. 171; *Naylor v. Winch*, 1 Sim.

& St. 555; *Pickering v. Pickering*, 2 Beav. 31, 56; *Pritt v. Clay*, 6 Beav. 503; *Stewart v. Stewart*, 6 Cl. & Fin. 911; *Davis v. Chanter*, 3 W. R. 321; *Trigge v. Lavallée*, 15 Moo. P. C. 270; *Stainton v. Carron Co.*, 30 L. J. Ch. 713, *supra*, pp. 94, 95, 475.

(*i*) *Scott v. Scott*, 11 Ir. Eq. 75.

(*k*) *Stockley v. Stockley*, 1 V. & B. 23; *Dunnage v. White*, 1 Sw. 137; *Gordon v. Gordon*, 3 Sw. 400; *Neale*

But a family settlement will not be supported, if founded on a mistake of fact of either party to which the other party is accessory, although such mistake may have been innocently brought about by the other party (*l*). Where accordingly a resettlement of family estates was made by the father, tenant for life, and the son, tenant in tail in remainder, upon the supposition that a charge for portions was within the power of the father to appoint or release, and not, as was the fact, a subsisting charge, it was set aside as being founded on a mistake (*m*).

The instrument of contract may be correctly expressed according to the intention of each party, and yet there may be no real agreement by reason of a mistake between them as to the application of the expression to the facts. This may arise from the generality or ambiguity of the expression, admitting of two different constructions or meanings as applied to the facts or from a certain expression applying equally to two different things (*n*).

Mistake as to application of contract.

The expression of the contract may be sufficiently general or ambiguous to admit of different applications, and may be accepted by each party with a different application unknown to the other. In this case the written contract must be construed and applied, if possible, according to its terms, but it is open to either party to show his application of the contract so far as is consistent with the terms used, and if no reasonably certain construction can be adopted in the application to the facts, the contract would be void in law by reason of the uncertainty and impossibility of executing it (*o*). Thus, where the particulars of a sale by auction were ambiguous as to including or excluding timber, and the vendor and purchaser accepted them with a different meaning; it was held that specific performance could not be decreed upon either construction (*p*). So where upon the sale of a reversion of an undivided moiety of an estate, the

v. Neale, 1 Keen, 672; *Westby v. Westby*, 2 Dr. & War. 502; *Stewart v. Stewart*, 6 Cl. & Fin. 911; *Persse v. Persse*, 7 Cl. & Fin. 279; *Williams v. Williams*, 2 Dr. & Sm. 378.

(*l*) *Fane v. Fane*, 20 Eq. 706.

(*m*) *Ib.*

(*n*) Leake on Contracts, 329.

(*o*) *Ib.* 330.

(*p*) *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 V. & B. 524.

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rent was stated upon the particulars of sale to be at a certain sum, leaving it ambiguous whether the half or the whole of the stated rent was the subject of sale, a bill for specific performance charging the contract as for a purchase of half the rent mentioned, was dismissed upon the ground that the purchaser was induced by the particulars to believe that he purchased the whole rent (*q*).

So, also, where the terms of a contract were ambiguous and something different from what was claimed by the purchaser was intended to be sold by the vendor, the Court would not at the suit of the purchaser, compel the vendor specifically to convey property not intended or believed by him to be included in the contract, though the vendor was the author of the ambiguity (*r*).

If, in the application of the contract to the facts and circumstances, it appears that a thing or matter referred to is sufficiently identified, but with some inaccurate description or addition, the latter may be rejected or corrected in the application as expressed in the maxim *fulsa demonstratio non vocet* (*s*). Thus, where a tenant contracted to transfer his tenancy in certain premises, describing them as the premises he then occupied, and known by a certain name, and it appeared that he occupied a part only of the premises known by that name; it was held upon a construction of the contract as applied to the facts that the premises occupied were the essential description, and were alone included in the contract (*t*). So, also, where an insurance is effected upon a ship, or upon goods on board a ship, if the subject of insurance be sufficiently identified, a mere misnomer of the ship would be immaterial (*u*).

A mistake in the application of the instrument of contract may arise from some expression therein sufficiently certain in itself, applying equally to two different things, one of which was

(*q*) *Swaisland v. Dearsley*, 29 Beav. 430.

(*r*) *Neap v. Abbott*, C. P. C. 333; *Manser v. Back*, 6 Ha. 443; *Baxendale v. Seale*, 19 Beav. 601.

(*s*) Leake on Contracts, 330.

(*t*) *Magee v. Lavell*, L. R. 9 C. P. 107.

(*u*) *Le Mesurier v. Vaughan*, 6 East, 382; *Ionides v. Pacific Insurance Co.*, L. R. 7 Q. B. 517.

intended by one party and the other by the other (*x*). This is called a latent ambiguity, and extrinsic evidence is admissible to prove the intention of the parties (*y*), and if it appear that each party mistook the meaning of the other, and that they intended different things by the same expression, the contract is void on account of the absence of a *consensus ad idem*, for each party was assenting to a different contract, notwithstanding the apparent mutual consent (*z*).

In *Thornton v. Kempster* (*a*), the sale was of ten tons of sound merchantable hemp, but it was intended by the vendor to sell Petersburg hemp, and by the buyer to purchase Riga hemp. The broker had made a mistake in describing the hemp to the buyer, and the Court held that there had been no contract whatever, the assent of the parties not having really existed as to the same subject-matter of sale. So, also in *Raffles v. Wickelhaus* (*b*), where A. and B. contracted for the sale of the cargo to arrive "*per* ship Peerless from Bombay," and it appeared that there were two ships of that name then arriving from Bombay, and that A. meant one ship and B. the other, it was held that there was no contract. So when the master of a ship having chartered it to a broker, who again chartered it in his own name, the latter placed a cargo on board for which the master signed bills of lading for delivery, "paying freight for the said goods, as *per* charter party," and the cargo was delivered and the shipper paid his charterer before either party had any notice or knowledge of the other charter; it was held that the master could not recover freight upon the bill of lading, because that document being equally applicable to either charter-party, there was in fact no agreement or contract between them, and it was further held that there could be no implied contract with the master to pay a reasonable freight for the carriage of the cargo because it was shipped in fulfilment of a contract expressly exclusive of such intention (*c*). "It appears," said

(*x*) Leake on Contracts, 331.

Ch. 333.

(*y*) *Smith v. Jeffryes*, 15 M. & W. 562, *per* Alderson, B.

(*a*) 5 Taunt. 786.

(*b*) 2 H. & C. 906.

(*z*) *Smith v. Hughes*, L. R. 6 Q. B. 597; *Marshall v. Berridge*, 51 L. J.

(*c*) *Smitt v. Tiden*, L. R. 9 Q. B. 446.

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the Court (*d*), "that each of the parties acted under a mistake. The master supposed that the bill of lading which he signed referred to his charter-party; the defendants supposed that it referred to the charter-party which they had made. Each of them was ignorant of what was in the mind of the other; each acted in good faith, and neither of them did anything calculated to or which did in any way mislead the other. Under these circumstances, the bill of lading being ambiguous and equally capable of being applied to the one charter-party as to the other, we cannot hold it to be a contract or evidence of a contract between the parties. It does not express that which was common to both minds, and therefore it is not binding upon the parties."

But one of the parties to an apparent contract may by his own fault be precluded from setting up that he entered into it in a different sense to that in which it was understood by the other. Thus, in the case of a sale by sample where the vendor exhibited by mistake a wrong sample, it was held that the contract was not avoided by this error of the vendor (*e*). But if the purchaser be aware that the vendor was under a mistake as to the sample he was offering, the vendor would be entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him (*f*). "If, therefore," said Mr. Justice Hannen (*g*), "the plaintiff knew that the defendant in dealing with him for oats did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that he apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent and not the real bargain."

Care must be taken not to confound a common mistake as to the subject-matter of sale or the price or the terms which prevent the sale from ever coming into existence by reason of the absence of a *consensus ad idem*, with a mistake made by one of the parties as to a collateral fact

(*d*) *Ib.*, 449.(*f*) *Smith v. Hughes*, L. R. 6(*e*) *Scott v. Littledale*, 8 E. & B. Q. B. 607.

815.

(*g*) *Ib.*, 610.

or what may be termed a mistake in motive. If the buyer purchases the very article at the very price and on the very terms intended by him and by the vendor, the sale is complete by mutual assent, even though the buyer or the seller may be totally mistaken in the motive which induced the assent (*h*). If, for example, a man buy a horse without a warranty, believing him to be sound, and the horse turns out unsound, it is not open to him to say that as he had intended to buy a sound horse and the seller to sell an unsound one, the contract is void because the seller must have known from the price the buyer was willing to give, or, from his general habits as a buyer of horses, that he thought the horse was sound. So, also, if a trainer of horses agree to buy a particular parcel of oats, believing them to be old oats, and therefore suitable for his purpose, new oats being unsuitable, but omits to make their age a condition of the contract, the sale is good although the oats are new and unsuitable for the purpose of the buyer (*i*). "All that can be said," said Chief Justice Cockburn (*j*), "is that the two minds were not *ad idem* as to the age of the oats. They certainly were *ad idem* as to the sale and purchase of them."

Where one of the parties to a contract having partial interests, but believing himself to be entitled to the entirety, enters into a contract with a purchaser to sell the estate in its entirety, it is not competent to him afterwards to say that because the purchaser cannot have the estate in its entirety, he is not entitled to such an interest as the vendor can give. The vendor is bound by the assertion in his contract, and if the purchaser chooses to take as much as the vendor can give a title to, he is entitled to have specific performance of as much as the vendor can give a title to, with an abatement or compensation for the deficiency (*k*). Specific performance with compensation in cases of mistake.

Mistake is not an answer to an action for specific performance when the mistake is not as to the essential terms of a contract, but is a mistake as to the quantity of acres of land comprised

(*h*) Benjamin on Sale, 58.

(*k*) *Mortlock v. Buller*, 10 Ves.

(*i*) *Smith v. Hughes*, L. R. 6 Q. B. 597.

315; *Burrow v. Scammell*, 19 Ch. D. 175.

(*j*) *Ib.*, 606.

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in a contract. In such a case the mistake is a proper subject for compensation (*l*). Where accordingly the plaintiff offered to take a lease of a farm belonging to the defendant at a rent of 500*l.* per annum, specifying in his tender the closes which he wished to take with their acreage, amounting in the whole to 249 acres, and defendant's agent, who had in fact let one of the closes to another person and desired only to let 214 acres with the farm, accepted plaintiff's offer; it was held that the defendant must grant the plaintiff a lease of 214 acres at a rent reduced in proportion (*m*).

Money paid
under mistake
of fact.

Money paid voluntarily under mistake of fact is recoverable both at law and in equity where it is against justice and conscience that the receiver should retain it (*n*). It is not sufficient to preclude a man from recovering money paid by him under a mistake of fact that he had the means of knowledge of the fact, or that he has been careless in omitting to use due diligence to inquire into the fact (*o*). Money, indeed, paid under a *bonâ fide* forgetfulness of facts which disentitled the receiver to receive it, may be recovered back (*p*).

If, however, money is intentionally paid without reference to the truth or falsehood of the fact, the party paying meaning to waive all enquiry into it, and that the person receiving it shall have the money at all events, whether the fact be true or false, the latter is entitled to retain it (*pp*).

Money paid in ignorance of the facts is recoverable, provided there has been no *laches* in the party paying. There may be cases where on account of the mutual relation between the parties, the party paying the money, though under mistake of fact, is by breach of duty disentitled from recovering (*q*). Thus, a banker who paid money on a forged cheque and had not, as bankers are bound to do, given notice of the forgery of the

(*l*) *McKenzie v. Heslath*, 7 Ch. D. 680.

(*m*) *Ib.*

(*n*) *Kelly v. Solari*, 9 M. & W. 54; *Freeman v. Jeffries*, L. R. 4 Exch. 198; *Kendal v. Wood*, *ib.*, 6 Exch. 252.

(*o*) *Kelly v. Solari*, 9 M. & W. 54;

Townsend v. Crowdy, 8 C. B. N. S. 494.

(*p*) *Kelly v. Solari*, 9 M. & W. 54.

(*pp*) *Ib.*, per Lord Wensleydale.

(*q*) *Durrant v. Ecclesiastical Commissioners*, 6 Q. B. D. 235.

cheque, was held not entitled to recover the money back (r). But if there is no duty cast on the party paying money which makes his delay in discovering the mistake *laches* on his part, he may recover back money paid by him under mistake of fact (s). In a case accordingly where the plaintiff by mistake paid to defendants who were owners of the tithes of a parish tithe rent-charge in respect of lands not in his occupation, and did not discover the mistake until the two years limited by 6 & 7 Will. IV., c. 71, for the recovery of a rent-charge had expired and the defendants had lost their remedy for their arrears against the lands actually chargeable; it was held that he might recover the money paid by him in mistake from the defendants, inasmuch as there was no duty cast on him in relation to the defendants which made his delay in discovering the mistake *laches* on his part (t).

Where money has been paid to an agent under a mistake of fact and the agent has either paid it over or settled his account with his principal and is guilty of no fraud in the matter, he is not liable to refund the money. Recourse must be had to the principal (u).

The principle that money paid under mistake of fact may be recovered back does not apply where the mistake was not made by the person who paid the money, but by another person on whose mistake he thought fit to act (x).

In cases in which the party receiving the money may have been ignorant of the mistake of the party paying it, a demand should be made before bringing an action to recover it (y). In cases of fraud, however, the instant that money is paid under a misrepresentation of fact the right of action accrues (z).

Where accounts are impeached and it is shown that they con- Errors in
accounts.

(r) *Cocks v. Masterman*, 9 B. & C. 405.
902.

(s) *Durrant v. Ecclesiastical Commissioners*, 6 Q. B. D. 235.

(t) *Ib.*

(u) *Holland v. Russell*, 1 B. & S. 432, 4 B. & S. 14. See *Shand v. Grant*, 15 C. B. N. S. 325; comp. *Newall v. Tomlinson*, L. R. 6 C. P.

(x) *Moss v. Mersey Docks, &c., Co.*
20 W. R. 700.

(y) *Kelly v. Solari*, 9 M. & W. 58,
per Lord Wensleydale; *Freeman v. Jeffries*, L. R. 4. Exch. 198.

(z) *Pope v. Wray*, 4 M. & W. 453;
per Lord Wensleydale.

Chap. I.

Opening
accounts.

tain errors of considerable extent, both in number and importance, the Court will order such accounts, though extending over a long period of years, to be opened, and will not merely give liberty to surcharge and falsify. If a fiduciary relation exists between the parties, the Court will make a similar order, if such accounts are shown to contain a less number of errors (*a*). A single important error in an account is sufficient to entitle the Court to open an account if it thinks fit to do so (*b*). But where a single item is complained of and the accounts are of some years' standing, the Court will not, as a general rule, except in the case of fraud, order the whole account to be opened, but will order that the plaintiff be at liberty to surcharge and falsify (*c*).

Errors discovered
after execution
of conveyance.

As a general rule a purchaser, after the conveyance is executed by all necessary parties, has no remedy in respect of any defect either in the title to or quantity or quality of the estate which are not covered by the vendor's covenants (*d*). In the case of *Legge v. Croker* (*e*) it was held that no compensation could be granted in a case where a lease had been deliberately executed making no mention of a right of way over the premises, though there was such a right of way and though the lessor had more than once represented to the lessee that there was no such right of way, and though the heads of the intended agreement between the parties, including the statement that there was no such right of way, had been reduced to writing, but not signed by the parties before the lease was prepared. So also in *Brett v. Clowser* (*f*), the Court held that a purchaser was not entitled to compensation after the completion of the purchase for the absence of a right of way which the auctioneer at the sale honestly, but under a mistake, represented to belong to the premises.

(*a*) *Williamson v. Barbour*, 9 Ch. 550.
D. 529.

(*b*) *Coleman v. Mellersh*, 2 Mac. & G. 309; *Pritt v. Clay*, 6 Beav. 503.

(*c*) *Allfrey v. Allfrey*, 1 Mac. & G. 57; *Gething v. Keighley*, 9 Ch. D.

(*d*) *Clare v. Lamb*, L. R. 10 C. P. 335; *Allen v. Richardson*, 13 Ch. D. 524.

(*e*) 1 Ba. & Be. 506.

(*f*) 5 C. P. D. 388.

But where in an agreement for the sale of land the conditions of sale provide that if any error or misstatement should be found in the particulars of sale, it should not annul the sale, but that compensation should be made in respect thereof, an error although not discovered until after the completion of the conveyance, is a proper subject of compensation within the meaning of the condition. If no distinction is made in the conditions of sale between an error or mistake discovered before and one discovered after the execution of the conveyance, it will not be imported into the contract (*g*).

In a case where leasehold premises were sold by the executors of a deceased husband under a mistake that the property belonged to him, whereas it belonged to the wife, and the conveyance was completed, the property being afterwards recovered by the widow, it was held that the purchaser could not recover the purchase-moneys as upon a failure of consideration (*h*). "Here," it was said (*hh*), "the plaintiff is calling on the vendors to refund money which they honestly believed themselves to be entitled to at the time they received it" (*i*).

The application for relief on the ground of mistake must be made with due diligence (*k*). In cases of mistake, as in cases of fraud, time runs from the discovery (*l*).

Principles on which Court interposes on the ground of mistake.

Where there has been some common mistake as to some essential fact, forming an inducement to the contract, whether it be a mistake as to the subject-matter of the contract, or the price, or the terms, that is, where the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the contract is voidable at the election of either of the parties. If either party has performed his part of the contract during the continuance of the

(*g*) *Bos v. Helsham*, L. R. 2 Exch. 76; *Re Turner & Skelton*, 13 Ch. D. 130; *Phelps v. White*, 7 L. R. 1. 160; *contra Manson v. Thacker*, 7 Ch. D. 623.

(*h*) *Clare v. Lamb*, L. R. 10 C. P. 340.

(*hh*) *Ib*.

(*i*) *Supra*, p. 520.

(*k*) *Beaumont v. Bramley*, T. & R. 43; *Denys v. Shuckburgh*, 4 Y. & C. 53; *Stone v. Godfrey*, 5 D. M. & G. 76; *Bentley v. Mackay*, 31 Beav. 143, 4 D. F. & J. 279, *supra*, p. 339 *et seq.*; *Grymes v. Saunders*, 3 Otto (Amer.) 62.

(*l*) *Brooksbank v. Smith*, 2 Y. & C. 60, *supra*, p. 345.

mistake, he may set aside the contract on discovering the truth, unless he has done something to render it impossible for him to restore the other party to the condition in which he was before the contract was made (*m*).

Transactions, although impeachable on the ground of mistake, are nevertheless subject to all real and just equities between the parties. The Court will not set aside a transaction without restoring the party against whom it interferes, as far as possible, to that which shall be a just situation with reference to the rights which he had antecedently to the transaction (*n*). If the Court sees that it can restore the parties to their former condition, or place them in the same situation in which they would have stood but for the mistake, without interfering with any new right acquired by others, on the faith of the altered condition of the legal rights, the jurisdiction will be exercised (*o*). The Court will not, however, relieve against a mistake, unless it is fully satisfied that it can make ample compensation (*p*). If the Court sees that the parties cannot be restored to that which shall be a just situation with reference to the rights which they had antecedently to the transaction, or that the mistake cannot be corrected without breaking in upon, or affecting the rights of innocent parties, who were not aware of the existence of the mistake, when their rights accrued, relief cannot be given (*q*). But if a good case be made out, the Court will not hold its hand merely because on account of circumstances which have intervened, it may be difficult to restore

(*m*) *Cox v. Prentice*, 3 M. & S. 344 ;
Blackburn v. Smith, 2 Exch. 783 ;
Strickland v. Turner, 7 Exch. 208 ;
Clarke v. Dickson, E. B. & E. 148 ;
Freeman v. Jeffries, L. R. 4 Exch.
 195.

(*n*) *Supra*, p. 367.

(*o*) *M'Alpine v. Swift*, 1 Ba. & Be.
 293 ; *Dacre v. Gorges*, 2 Sim. & St.
 454. See *Millar v. Craig*, 6 Beav.
 433 ; *Meadours v. Meadows*, 16 Beav.
 401 ; *Scholfield v. Templer*, John,
 165.

(*p*) *M'Alpine v. Swift*, 1 Ba. &
 Be. 293 ; *Dacre v. Gorges*, 2 Sim. &
 St. 454, *supra*, p. 372.

(*q*) *Mulden v. Menill*, 2 Atk. 8 ;
Clifton v. Cockburn, 3 M. & K. 76 ;
Blackie v. Clarke, 15 Beav. 595 ; *Re*
Saxon Life Insurance Co., 2 J. & H.
 408 ; *Bateman v. Boynton*, 1 Ch.
 359 ; *Fowler's Case*, 14 Eq. 316 ;
supra, pp. 367, 369, 370. *Comp.*
Broughton v. Hutt, 3 D. & J. 501.
 See, also, *Domat. Liv.* 1, tit. 18, s. 1,
 art. 13—17.

the parties exactly to their original condition (*r*). It is enough if the Court sees that it would not be difficult to adjust so as to place the parties in a position in which they would receive little or no prejudice from what has been done (*s*). As against *bonâ fide* purchasers for value without notice, no relief can be had in equity (*t*). But if lands shown to a purchaser are accepted in the conveyance under a name by which he did not know them, he may, by getting in an outstanding legal estate, hold them, even as against a subsequent purchaser for valuable consideration, and without notice (*u*).

If the subject matter of the transaction be real estate, and there has been a conveyance, a reconveyance will be ordered, if a case be made out for the interference of the Court (*x*).

On setting aside a transaction on the ground of mistake, the Court may, with a view of putting the parties in the position in which they have an equity to stand, annex conditions to the decree. In a case, for example, where, by a mistake in drawing up an instrument, the rent named as payable upon the lease of premises was considerably less than the amount actually agreed upon between the parties, and the mistake was known to one of the parties at the time of the execution of the instrument, but not to the other, the Court gave the lessee an election to continue in the tenancy, on consenting to pay the amount of rent, which ought to have been inserted in the instrument, or to abandon the lease, and pay for use and occupation during the period he had been in possession of the premises at the higher rate, being compensated for all repairs of a permanent character, but not for the expense of taking possession of the premises and establishing himself in business. It was also held that the lessor was responsible to refund the monies advanced to the lessee upon the security of the lease with costs; the

(*r*) *Earl Beauchamp v. Winn*, 6 Ab. 355.
E. & I. App. Ca. 232.

(*s*) *Ib.*

(*t*) *Malden v. Mevill*, 2 Atk. 8;
Warrick v. Warrick, 3 Atk. 293;
supra, p. 349 *et seq.*

(*u*) *Oxwick v. Brockett*, 1 Eq. Ca. 374, 375.

(*x*) *Cox v. Bruton*, 5 W. R. 544;

Leuty v. Hillas, 2 D. & J. 120;

Malmesbury v. Malmesbury, 31 Beav.

418: *supra*, p. 373. See as to terms

of reconveyance, *supra*, pp. 373,

lessee being liable over to the lessor for repayment of the same, on the ground that, if the lease were rejected, the premises must stand as a security for the money so advanced ; and if the lease was accepted, it was primarily liable for the repayment of the same to the lessor (y).

Acquiescence in what has been done will not be a bar to relief where the party alleged to have acquiesced has acted or abstained from acting through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed (z).

A party to an apparent agreement which is void on the ground of mistake may assert the nullity of the transaction by way of defence, and may seek by counterclaim to have the instrument sued on set aside. If he has actually paid money as in performance of a supposed valid agreement, and in ignorance of the facts which exclude the validity of the agreement, he may recover back his money as having been paid without consideration.

Where the defendant had induced the plaintiff to execute an agreement to take a lease at a certain rent under the representation that that was the rent at which he held the same premises of his landlord, whereas in fact he held at a lower rent ; upon a bill filed for the correction of the agreement and for specific performance by granting a lease at a lower rent ; it was held that although the plaintiff could not be compelled to take the lease at the rent stated in the agreement, he was not entitled to have one at the lower rent, because the defendant could not be charged with any other agreement than that executed (a).

Measure of
damages.

Upon a contract for the sale and purchase of real estate, if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover damages for the loss of his bargain. He can only recover the expenses he has incurred (b). To entitle a plaintiff, in an action for specific

(y) *Garrard v. Frankel*, 30 Beav. 445.

(z) *Earl Beauchamp v. Winn*, 6 E. & I. App. Ca. 223, *supra*, p. 333-335.

(a) *Woollam v. Hearn*, 7 Ves. 211.

(b) *Bain v. Fothergill*, 7 E. & I. App. Ca. 158.

performance, to recover damages other than his expenses in respect of a breach of contract by defendant, misrepresentation must be pleaded and established (c).

In an action for taking coal from plaintiff's land, in the absence of any wilful wrong, or other circumstances warranting punitive damages, the true rule of damages is the value of the coal at the pit's mouth, less the cost of labour in severing it from the freehold and raising it to the pit's mouth (d).

In an action for logs of wood cut and carried away in the mistaken belief that the defendant's employer was the owner, the measure of damages is the value in the woods whence they were taken, and not at the mill where they were carried to be sawed (e).

Where an action is brought for specific performance, and specific performance is refused on the ground of mistake, the Court ought to give the same damages as would, under the old practice, have been given in an action at law (f).

Courts of equity have jurisdiction on the ground of mistake to relieve against the defective execution of a power. If the formalities required by a power are not strictly complied with, an appointment under the power is invalid at law, and the property which is the subject of the power will go as in default of appointment. In equity, however, if an intention to execute the power be sufficiently declared, but, by reason of some informality, the act declaring the intention is not an execution of the power, the Court will, in favour of certain parties, aid the defective execution, by compelling the person seised of the legal estate to do that which was intended to be done (g). The supplying the surrender of a copyhold and the supplying the execution of a power which is defective in form go hand in hand. Wherever there is a decision that the Court will supply

Defective
execution of
powers.

(c) *Rock Portland Cement Co. v. Wilson*, 31 W. R. 193.

(d) *Llynvi Co. v. Brogden*, 11 Eq. 188; *Jegon v. Vician*, 6 Ch. 742.

(e) *Tilden v. Johnson*, 36 Amer. Rep. 769.

(f) *Tamplin v. James*, 15 Ch. D. 220.

(g) *Chapman v. Gibson*, 3 Bro. C. C. 229; *Shannon v. Bradstreet*, 1 Sch. & Lef. 63; *Sayer v. Sayer*, 7 Ha. 377.

a surrender, it follows that the Court will also supply the defective execution of a power (*h*).

The powers to which the equity extends are those which have been created by way of use, as distinct from bare authorities conferred by law. Acts done under authorities of this latter kind, as for example leases or conveyances by a tenant in tail, are only binding, when regular and complete. The principle of the distinction appears to be that powers limited by use are mere reservations out of the original ownership, constituting the donee a *quasi*-owner and the remainderman a *quasi*-heir; and, consequently, that in conformity with this hypothesis, the donee's contracts for value ought to bind the remainderman, and his meritorious intention, if unaltered, ought to have the same effect (*i*). The soundness of this equity has been questioned by Sir William Grant, and its principle seems difficult to sustain. For the power given, though doubtless in some sense a modified ownership, does not confer an absolute right to dispose of the property, but a right to do so in a specific way; and the chance that the power may never be executed or that it may not be executed in the manner prescribed is an advantage given to the remainderman. If therefore his interest is to be regarded, it is difficult to see why he should be bound by any other than the prescribed act, for he is a stranger to any equity between the donee of the power and the party in whose favour it is intended to be executed. If, on the other hand, his interest is subordinate to the intention of the donee of the power, the intention of such donee ought to be sustained, whatever be the consideration on which it rests (*k*).

Whatever opinion may, however, be entertained as to the original soundness of the equity, there is no question that it is established by precedent, but it is confined to cases of execution formally defective, or of contract amounting to such defective execution (*l*). If there be no such execution or contract, the Court cannot interpose; for unless where the power is in the

(*h*) *Sayer v. Sayer*, 7 Ha. 387; (*k*) *Holmes v. Coghill*, 7 Ves. 506,
per Wigram, V.-C.; *Chapman v.* 12 Ves. 206, Adams Doct. Eq. 99.
Gibson, 3 Bro. C. C. 229. (*l*) Adams Doct. Eq. 100.

(*i*) Adams Doct. Eq. 99.

nature of a trust, the donee has his choice whether to execute it or not; and if he does not execute or attempt to execute, there is no equity to execute it for him or to do that for him which he did not think fit to do himself (*n*). Nor can an execution be aided in equity, if the defect be not formal, but in the substance of the power, for such aid would defeat the intention of the donor. If, for example, a tenant for life has power to lease with the consent of trustees or others, an agreement by the tenant for life alone to lease will not be aided (*n*).

The only persons in whose favour equity will interpose to supply the defect in the execution of a power are, a *bonâ fide* purchaser for valuable consideration (*o*), a creditor (*p*), a charity (*q*), a wife or a legitimate child (*r*). To no other persons, except a wife and legitimate child, will the aid of the Court be granted upon the ground of a meritorious consideration (*s*). The equity does not extend to the case of a defective execution by a wife in favour of her husband (*t*); nor to a defective execution in favour of a natural child, a father, mother, brother, sister, nephew, or cousin: *à fortiori* it does not extend to a volunteer (*u*).

The character of purchaser, creditor, wife, or child, must be borne by the party claiming relief in relation to the donee of the power and not to the person creating the power (*x*).

In *Wilkinson v. Nelson* (*y*), a deed of appointment in favour of some of the objects of a power, was rectified by the insertion of a hotchpot clause, the Court being satisfied that the intention of the donee of the power was to produce equality, and that the clause had been omitted by mistake (*z*).

(*n*) *Tollet v. Tollet*, 2 P. Wms. 489.

(*o*) *Lawrenson v. Butler*, 1 Sch. & Lef. 13.

(*p*) *Hughes v. Wells*, 9 Ha. 769; *Affleck v. Affleck*, 3 Sm. & G. 394; Sug. Pow. 533, 534.

(*q*) *Chartered Bank of Australia v. Lempriere*, L. R. 4 P. C. 597.

(*r*) *Innes v. Sayer*, 7 Ha. 377.

(*s*) *Hervey v. Hervey*, 1 Atk. 567;

Medwin v. Sandham, 3 Sw. 686;

Proby v. Landor, 28 Beav. 504.

(*t*) *Moodie v. Reid*, 1 Madd. 516.

(*u*) *Id.*

(*x*) Sug. Pow. 535, and cases cited.

(*y*) Sug. Pow. 537.

(*z*) 7 Jur. N. S. 481.

(*z*) See *Killick v. Gray*, 46 L. T. N. S. 583.

Persons in whose favour the defective execution of a power will be aided.

Chap. I.

Intention to execute the power must appear.

It is not sufficient in order to constitute a case entitling a party to relief in equity on the ground of the defective execution of a power that there should be a mere intention on the part of the donee to execute the power, without some steps taken to give it a legal effect. Some steps must be taken or some acts must be done with this sole and definite intention, and such steps or acts must be properly referable to an intention to execute the power (*a*). A mere parol promise or agreement to execute the power is not sufficient (*b*). Nor is the mere expression of a wish contained in a memorandum sufficient (*c*). But if an intention to execute the power appear clearly by some paper or instrument in writing, equity will aid a defect which arises from the instrument itself being informal or inappropriate (*d*): as, for instance, where the donee of a power covenants (*e*), or merely enters into an agreement, not under seal, to execute the power (*f*), or when by his will he desires the remainderman to create the estate authorised by the power (*g*), or if he promises by letter to grant an estate which he could only do by the exercise of his power (*h*), or if having a power to appoint by an instrument sealed and delivered, he wrote and signed an unattested paper expressing his intention that a particular child shall have the property which is the subject of the power (*i*), or where a woman having a power to appoint a fund by deed or will gives a letter charging the fund in favour of a purchaser for value (*k*). In all these and the like cases equity will supply the defect. So also a recital by the donee of a power, in the marriage settlement of one of his daughters, who was one of the objects of the power, that she was entitled to a share of a sum to which she could only be entitled by his

(*a*) *Garth v. Townsend*, 7 Eq. 223;
Bruce v. Bruce, 11 Eq. 372.

(*b*) *Carter v. Carter*, Mose. 370;
Shannon v. Bradstreet, 1 Sch. & Lef.
72.

(*c*) *Garth v. Townsend*, 7 Eq. 223.

(*d*) *Sayer v. Sayer*, 7 Ha. 377.

(*e*) Sug. Pow. 550.

(*f*) *Shannon v. Bradstreet*, 1 Sch.
& Lef. 52; *Dowell v. Dew*, 1 Y. & C.

C. C. 345; Sug. Pow. 550.

(*g*) *Vernon v. Vernon*, Amb. 3;
Sug. Pow. 550.

(*h*) *Campbell v. Leach*, Amb. 740;
Sug. Pow. 550.

(*i*) *Kennard v. Kennard*, 8 Ch.
228.

(*k*) *Chartered Bank of Australia v.*
Lempriere, L. R. 4 P. C. 597.

appointment, has been held sufficient evidence of his intention to execute the power, so as to be aided in equity (*l*), and even an answer to a bill in chancery stating that the party does appoint and intend by writing in due form to appoint will be an execution of the power for this purpose (*m*). So, also, if the power ought to be executed by deed, but it is executed by will, the defective execution will be supplied (*n*), if there is nothing in the instrument creating the power to mark the intention of the creator of the power beyond the fact that he has pointed to a deed as the mode of executing the power. But it is competent to a settlor to make the nature and character of the instrument by which the power he creates shall be executed of the essence of the power, without observing which no execution of his power shall be valid. Equity in such a case will not uphold an act which will defeat what the person creating the power has declared by expression or necessary implication to be a material part of his intention (*o*).

The Court will supply the defect where there has been a defective execution of a power by a formal or appropriate instrument: as, for instance, if a deed be required by the power to be executed in the presence of a certain number of witnesses, and it be executed in the presence of a smaller number of witnesses: or if it is required to be signed and sealed, and sealing is omitted (*p*). In wills not coming within the operation of the Wills Act, 1 Vict. c. 26, a defect in the execution of a power, consisting in the want of the number of witnesses required by the power, was supplied in equity (*q*). But the power to assist defective executions of appointments within the statute has ceased as to wills made on or after the 18th January, 1838.

(*l*) *Wilson v. Piggott*, 2 Ves. Jr. 351. See *Poulson v. Welling*, 2 P. Wms. 533.

(*m*) *Carter v. Carter*, Mose. 365.

(*n*) *Tollet v. Tollet*, 2 P. Wms. 489; *Smith v. Adkins*, 14 Eq. 405.

(*o*) *Cooper v. Martin*, 3 Ch. 57.

(*p*) *Wade v. Puget*, 1 Bro. C. C. 363; *Cockerell v. Cholmley*, 1 R. & M. 424; *Kennard v. Kennard*, 8 Ch.

228. An appointment by deed is now rendered valid in many cases, although not executed or attested with all the solemnities required by the instrument creating the power, 22 & 23 Vict. c. 35, s. 12.

(*q*) *Wilkie v. Holmes*, 1 Sch. & Lef. 60 n.; *Lucena v. Lucena*, 5 Beav. 249; Sug. Pow. 517.

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The validity of an appointment by will, so far as regards execution and attestation, now wholly depends on the Statute Law (*r*).

The Court will also, in order to give effect to the intention of the donee of the power for that purpose, aid the execution of a power not specially referred to, though such power was not present to the mind of the donee at the time of execution (*s*).

No relief so as to defeat intention of author of power.

Equity will in no case aid a defective execution of a power, if the intention of the person creating the power would be thereby defeated. Although a power will be aided, if it has been executed by a will, when it ought strictly to have been executed by deed (*t*), the case is otherwise, if a power, required to be exercised by will, has been executed by deed (*u*). The intention of a power to appoint by will being to reserve to the donee of the power a certain control over the estate, until the moment of the death of the donee, if the donee of such a power should execute an appointment or a conveyance of the estate by an absolute deed, it will be invalid, because such an appointment or conveyance, if it avail to any purpose, must avail to the destruction of the power, since it would be no longer revocable, as a will would be. The distinction between this case and the case of a power executed by will, though required to be executed by deed, is marked and obvious. An act done not strictly according to the terms of the power, but consistent with its intent, may be upheld in equity. But an act which defeats the intention of the person creating the power, and determines the control over the property, which was meant to rest in the donee, is repugnant to it, and cannot be deemed in any just sense to be an execution of it (*x*).

As against whom equity will aid a defective execution.

In all cases, however, where the aid of the Court is sought for the purpose of aiding the defective execution of a power, the party seeking relief must stand upon some equity superior to

(*r*) Sug. Pow. p. 559.

(*s*) *Bruce v. Bruce*, 11 Eq. 377.

(*t*) *Supra*, p. 531.

(*u*) *Reid v. Shergold*, 10 Ves. 378, 380; *Re Walsh's Trust*, 1 L. R. I.

373.

(*x*) *Ib.*; Sug. Pow. 560, 561. See, also, *Cockerell v. Cholmeley*, 1 R. & M. 424, 2 R. & M. 751; but see 22 & 23 Vict. c. 35, s. 13.

that of the party against whom he seeks it (*y*). There can be no relief, if the aid of the defective execution would be inequitable to other parties, or if it is repelled by some counter-equity (*z*). As against a purchaser for valuable consideration without notice, equity will in no case aid the defective execution of a power (*a*). But as against a remainderman, who takes, although by purchase, subject to the power (*b*), and also in general as against an heir-at-law or customary heir (*c*), relief may be had against the defective execution of a power. Whether, however, equity will afford its aid as against an heir totally unprovided for, seems doubtful upon the authorities (*d*).

In cases of defective execution of powers a distinction exists between powers which are created by private persons, and those which are specially created by, or come within, a statute. The latter are construed with more strictness, and whatever formalities are required by the statute must be punctually complied with. In the case of powers which are in their own nature statutable, equity must follow the law, be the consideration ever so meritorious. Thus the power of a tenant-in-tail to make leases under a statute, if not executed in the requisite form prescribed by the statute, will not be made available in equity, however meritorious the consideration may be (*e*); and, indeed, it may be stated as generally true, that the remedial power of courts of equity does not extend to the supply of any circumstances, for the want of which the legislature has declared the instrument void, for otherwise equity would defeat the very policy of legislative enactments (*f*).

No relief against defective execution of statutory powers.

(*y*) Sug. Pow. 541; 2 Chanc. Pow. 502, 504, 507.

(*z*) *Supra*, pp. 524, 525.

(*a*) 1 Fonb. Eq. Bk. 1, ch. 1, s. 7, n. (*v*).

(*b*) *Tollet v. Tollet*, 2 P. Wms. 489; *Shannon v. Bradstreet*, 1 Sch. & Lef. 52.

(*c*) *Smith v. Ashton*, 1 Ch. Ca. 263, 264.

(*d*) *Chapman v. Gibson*, 3 Bro. C. C. 229; *Hills v. Downton*, 5 Ves.

564; *Braddick v. Mattock*, 6 Mad. 363; *Rodgers v. Marshall*, 17 Ves. 294; Sug. Pow. 545.

(*e*) *Darlington v. Pulleney*, Cowp. 267; 2 Chanc. Pow. 541—545; Sug. Pow. 209.

(*f*) 1 Fonb. Eq. Bk. 1, ch. 1, s. 7, n. (*t*); *Curtis v. Perry*, 6 Ves. 739, 745, 746, 747; *Mestaer v. Gillespie*, 11 Ves. 621, 624, 625; *Thompson v. Smith*, 1 Madd. 395.

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Defective execution aided on ground of fraud, &c.

Although a Court of Equity will not in general aid the defective execution of a power in favour of a volunteer, except in particular cases (*g*), the defective execution of a power will be aided in favour of a volunteer, when a strict compliance with the power has been impossible, from circumstances beyond the control of the party, as when the prescribed witnesses could not be found; or where an interested party having possession of the deed creating the power, has kept it from the sight of the party executing the power, so that he could not ascertain the formalities required (*h*).

So, also, although a Court of Equity will in no case aid the non-execution of a power, as distinguished from its defective execution (*i*), the case is otherwise, if the execution of a power has been prevented by fraud, as where the deed creating the power has been fraudulently retained by the person interested in its non-execution. In such and similar cases equity will grant relief on the ground of fraud (*k*).

Supply of defects in instruments.

In like manner, as equity will give relief against mistake in written instruments, so also it will grant relief and supply defects when by mistake parties have omitted any acts or circumstances necessary to give effect and validity to written instruments. Thus equity will supply any defect of circumstances in conveyances occasioned by mistake: as of a surrender in the case of copyholds: so also misprision and omission in deeds, awards, and other solemn instruments, whereby they are defective at law (*l*).

A party to a deed is not estopped in equity from averring or offering evidence to controvert a recital therein contrary to fact which has been introduced into the deed by mistake of fact and not through fraud or deception on his part (*m*).

Mistake in judgments and judicial proceedings.

The Court will also interfere in cases of mistake in judgments and in matters of record injurious to the right of the party. A party may after execution has been executed apply to have the

(*g*) *Supra*, p. 529.

(*h*) 1 Fonb. Eq. Bk. 1, ch. 5, s. 2, n. (*h*).

(*i*) *Tollet v. Tollet*, 2 P. Wms. 489; *Piggott v. Penrice*, Com. 250,

Gillb. Eq. Rep. 138.

(*k*) *Supra*, p. 310.

(*l*) 1 Fonb. Eq. Bk. 1, ch. 1, s. 7.

(*m*) *Brooke v. Haymes*, 6 Eq. 25.

judgment set aside on terms of paying all costs and placing the other party in the same situation as if there had been no mistake made. It generally happens that the application is made at the instance of the defendant against whom the plaintiff has signed judgment, but a plaintiff may seek to have a judgment signed by himself set aside on the ground of his own mistake. It can, however, only be obtained on the terms of putting the other party in the same situation as if the mistake had not taken place. The application must also be made within a reasonable time after the judgment has been acted on (*n*).

A judgment by consent is binding, but if it appears that the consent has been given in entire mistake of the facts, the Court will treat the consent as a mere nullity (*o*). But after a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake except for reasons sufficient to set aside an agreement (*p*).

The Court has jurisdiction to discharge an order made on interlocutory application by consent, where it is proved to have been made under a mistake, though that mistake was on one side only (*q*).

Where an interlocutory injunction has been wrongly granted through the judge's mistake in law, a man cannot be compelled to pay damages under the undertaking as to damages (*r*).

Where a special case is stated in an action and a decision given upon it under a mistake of fact, the Court is not bound by that decision unless it has been adopted by subsequent orders, but may disregard it, direct the action to go on to trial and direct inquiries to ascertain the real facts (*s*).

A foreign judgment of a court of competent jurisdiction is conclusive and not open to examination by another court unless the judgment impeached carries on the face of it manifest error, or it can be shown to have been obtained by fraud, or to be

(*n*) *Cannan v. Reynolds*, 5 E. & B. 306.

(*o*) *Stannard v. Harrison*, 19 W. R. 812.

(*p*) *Att.-Gen. v. Tomline*, 7 Ch. D. 388.

(*q*) *Mullins v. Howell*, 11 Ch. D. 763.

(*r*) *Smith v. Day*, 74 L. T. 356.

(*s*) *Tomline v. Underhay*, 22 Ch. D. 496.

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wanting in the conditions of natural justice (*t*). It cannot be impeached on its merits, nor can a man set up as a defence to an action on it that the tribunal mistook either the facts or the law. It makes no difference that the judgment proceeded on a mistake as to English law, and that the mistake appears on the face of the proceedings (*u*).

Surrenders of
copyholds
supplied.

The equity for supplying surrenders of copyholds, originates in the doctrine that a copyhold does not pass by grant or devise but by a surrender into the hands of the lord to the use of the grantee or the will. In the one case the grantee is entitled to immediate admission; in the other the person designated in the will is entitled to admission on the testator's death. If a grant or devise were made without a previous surrender, it was formerly inoperative at law; but if it were made for a valuable consideration, and in particular cases, if it were made for a meritorious consideration, the surrender might be supplied in equity (*x*). The supplying the surrender of a copyhold and the supplying the execution of a power which is defective in form go hand in hand. Wherever there is a decision that the Court will supply the one, it follows that it will also supply the other (*y*).

The jurisdiction to supply a surrender existed whether the gift were by deed or will (*z*), but it was ordinarily called into exercise in the case of wills. It has, however, been rendered of little practical importance by the enactment that all real estate may be devised by will, and that copyholds shall be included under that description, notwithstanding that the testator may not have surrendered them to the use of his will, nor have even been himself admitted to them (*a*).

Supply of defects
in written in-
struments, &c.

In like manner, as equity will give relief against mistakes in written instruments, will it give effect to the real intention of the

(*t*) *Messina v. Petrocchino*, L. R. 4 P. C. 144; *Abouloff v. Oppenheimer*, 10 Q. B. D. 302.

(*u*) *Godard v. Gray*, L. R. 6 Q. B. 147.

(*x*) *Rodgers v. Marshall*, 17 Ves. 294; but see as to case of meritorious consideration, *Jefferys v.*

Jefferys, Cr. & Ph. 138; *Tatham v. Vernon*, 29 Beav. 604.

(*y*) *Sayer v. Sayer*, 7 Ha. 387, per Wigram, V.-C., *supra*, p. 527.

(*z*) *Rodgers v. Marshall*, 17 Ves. 294.

(*a*) 1 Vic. c. 26, s. 3.

parties, as gathered from the objects of the instrument and the circumstances of the case, although the instrument may be drawn up in a very inartificial and untechnical manner. For, however just the general rule may be, *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* (b), yet that rule shall not prevail to defeat the manifest intent and object of the parties where it is clearly discernible on the face of the instrument, and the ignorance or blunder or mistake of the parties has prevented them from expressing it in the appropriate language (c).

In regard to mistake in awards the Court will not relieve against an award on the ground of mistake either in matter of law or fact, if the award is within the submission, and contains the honest decision of the arbitrators after a full and fair hearing of the parties, and the mistake does not appear on the face of the award, or is not disclosed by some contemporaneous writing (d). But if the mistake appears on the face of the award (e), or is disclosed by some contemporaneous writing (f), or if the arbitrator voluntarily admit a mistake (g), or state circumstances which show clearly that the proceedings have been erroneous (h), or if it appear from the evidence of the arbitrator that he has mistaken the subject-matter on which he ought to make his award, or if there is a mistake in legal principle going directly to the basis on which the award is founded (i), the Court will relieve or remit the award back to

Mistake in
awards.

(b) Co. Litt. 147 a.

(c) Jeremy Eq. Jur. pp. 367, 368 ;
Story Eq. Jur. 168.

(d) *Corneforth v. Geer*, 2 Vern. 705 ; *Ching v. Ching*, 6 Ves. 282 ; *Young v. Walter*, 9 Ves. 365 ; *Goodman v. Sayers*, 2 J. & W. 249 ; *Wood v. Griffith*, 1 Sw. 59 ; *Steff v. Andrews*, 2 Madd. 5 ; *Price v. Jones*, 2 Y. & J. 114 ; *Haigh v. Haigh*, 3 D. F. & J. 157 ; *Freeman v. Jeffries*, L. R. 4 Exch. 190 ; *Allen v. Greenslade*, 33 L. T. N. S. 567 ; *Greenwood v. Brownhill*, 44 L. T. N. S. 47.

(e) *Morgan v. Mather*, 2 Ves. Jr. 15.

(f) *Hogge v. Burgess*, 3 H. & N. 293.

(g) *Knox v. Symonds*, 1 Ves. Jr. 359 ; *Mills v. Bowyers' Society*, 3 K. & J. 66 ; but see *Philipps v. Evans*, 12 M. & W. 309 ; *Hogge v. Burgess*, 3 H. & N. 293.

(h) *Mills v. Bowyers' Society*, 3 K. & J. 66 ; *Flynn v. Robertson*, L. R. 4 C. P. 325 ; *Dinn v. Blake*, ib. 10 C. P. 388. See *Bankart v. Houghton*, 3 D. F. & J. 18.

(i) *Re Dare Valley Railway Co.*, 6 Eq. 435.

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the arbitrators under the Common Law Procedure Act (*k*), unless the submission has been made a rule of court under statute 9 & 10 Will. 3, c. 15, in which case application must be made to the Court in which it has been made a rule. An arbitrator having signed his award is *functus officio*, and cannot alter the slightest error, even though such error has arisen from the mistake of the clerk in copying it (*l*).

Mistake in
wills.

In regard to mistakes in wills, a Court of Equity has jurisdiction to correct them when they are apparent on the face of the will, or may be made out by a due construction of its terms. But the mistake must be apparent on the face of the will, otherwise there can be no relief; for at least since the Statute of Frauds, which requires wills to be in writing (whatever may have been the case before the statute) (*m*), parol evidence or evidence *dehors* the will is not admissible to contradict, vary, or control the words of the will, although it is in certain cases admissible to explain the meaning of the words which the testator has used (*n*).

A mistake cannot be corrected or an omission supplied, unless it is perfectly clear by fair inference from the whole will that there is such a mistake or omission (*o*). The first thing to be proved in all cases is that there is a mistake (*p*). The mistake must be a clear mistake or a clear omission, demonstrable from the structure and scope of the will (*q*). Thus, if in a will there is a mistake in the computation of a legacy, it will be rectified in equity (*r*). So, also, words may be struck out which are mani-

(*k*) 17 & 18 Vict. c. 125, s. 8; *Mills v. Bowyers' Society*, 3 K. & J. 66; *Aitken's Arbitration*, 3 Jur. N. S. 1296; *Mordue v. Palmer*, 6 Ch. 30; *Dinn v. Blake*, L. R. 10 C. P. 388; but see *Allen v. Greenslade*, 33 L. T. N. S. 567.

(*l*) *Mordue v. Palmer*, 6 Ch. 30.

(*m*) See *Milner v. Milner*, 1 Ves. 106; *Wigram on Wills*, p. 5.

(*n*) *Milner v. Milner*, 1 Ves. 106; *Ulrich v. Litchfield*, 2 Atk. 373; *Farrer v. St. Katherine's College*, 16 Eq. 21; *Jarm. on Wills*, vol. 1, pp.

409—415; *Wigram on Wills*, pp. 5, 8.

(*o*) *Philipps v. Chamberlaine*, 4 Ves. 57.

(*p*) *Mellish v. Mellish*, ib. 49.

(*q*) Ib.; *Philipps v. Chamberlaine*, ib. 51, 57; *Del Mare v. Robello*, 3 Bro. C. C. 445; *Purse v. Snaplin*, 1 Atk. 415; *Holmes v. Custance*, 12 Ves. 279.

(*r*) *Milner v. Milner*, 1 Ves. 106; *Danvers v. Manning*, 2 Bro. C. C. 18; *Door v. Geary*, 1 Ves. 255, 256; *Giles v. Giles*, 1 Keen, 692.

festly inconsistent with the form of the will and the intention of the testator (s). So, also, on the other hand words will be supplied where the Court is satisfied that they have been omitted by mistake (t). So, if there is a mistake in the name, description, or number of the legatees intended to take (u), or in the property intended to be bequeathed (x), and the mistake is clearly demonstrable from the structure and scope of the will, equity will correct it.

When a testator in a gift to children describes them as consisting of a specified number which is less than the number found to exist at the date of the will, the general rule of construction is to disregard the numerical restriction and to hold that the intention of the testator was that the whole of the children shall be included (y).

Where there is an error either in the name or the description of a legatee, there is no presumption in favour of the name more than the description. In order that the name should prevail against the description, it must be shown that there is an error in the description (z). In some cases the name has prevailed over the description (zz); in other cases the description has prevailed over the name (a).

Relief cannot, however, be had, unless the mistake be clearly

(s) *Smith v. Crabtree*, 6 Ch. D. 591; *Morrell v. Morrell*, 7 Pr. D. 70.

(t) *Greenwood v. Greenwood*, 5 Ch. D. 954; *Re Redfern*, 6 Ch. D. 133.

(u) *Stebbing v. Walkey*, 2 Bro. C. C. 85; *River's Case*, 1 Atk. 410; *Parsons v. Parsons*, 1 Ves. Jr. 266; *Beaumont v. Fell*, 2 P. Wms. 141; *Hampshire v. Peirce*, 2 Ves. 216; *Bradwin v. Harpur*, Ambl. 374; *Newman v. Piercy*, 4 Ch. D. 41; *Jarm. on Wills*, vol. 1, pp. 379—382, 422; *ib.*, vol. 2, pp. 189—193.

(x) *Door v. Geary*, 1 Ves. 255; *Selwood v. Mildmay*, 3 Ves. 306; *Ives v. Dodgson*, 9 Eq. 401; *Re Basset's Estate*, 14 Eq. 54; *Travers v. Blundell*, 6 Ch. D. 436; *Jarm. on Wills*, vol. 1, p. 377.

(y) *Garey v. Hilbert*, 19 Ves. 125; *Spencer v. Ward*, 9 Eq. 507; *McKechnie v. Vaughan*, 15 Eq. 289; *Re Bassett's Estate*, 14 Eq. 54.

(z) *Drake v. Drake*, 8 H. L. 179; *Charter v. Charter*, 7 E. & L. App. Ca. 381.

(zz) *Bernasconi v. Atkinson*, 10 Ha. 345; *Garner v. Garner*, 29 Beav. 114; *Gillett v. Gane*, 10 Eq. 33; *Farrer v. St. Katherine's College*, 16 Eq. 21; *Garland v. Beverley*, 9 Ch. D. 219; *Re Brake*, 6 Pr. D. 217.

(a) *Adams v. Jones*, 9 Ha. 485; *Hodgson v. Clarke*, 1 D. F. & J. 394; *Re Nunn's Trust*, 19 Eq. 333; *Charter v. Charter*, 7 E. & L. App. Ca. 364.

made out (*b*). And so, if the words of the bequest are plain, evidence of a different intention is inadmissible to establish a mistake (*c*); nor will a mistake be rectified, if it does not appear clearly what the testator would have done in the case, if there had been no mistake (*d*). But if the omission of some word or phrase is so palpable on the face of the will, that no difficulty occurs in pronouncing the testator to have used an expression which does not accurately convey his meaning, and it is not only apparent that he has used the wrong word or phrase, but it is also apparent what is the right one, the Court will substitute the right one (*e*). Although the particulars which the testator has included in his description of the property, the subject of the gift, should be inaccurate, the gift will be upheld if there be enough of correspondence to afford the means of identification (*f*). If the property the subject of the gift be capable of being accurately identified, certain errors in the description will not vitiate the gift (*g*).

The same considerations apply, when the particulars which the testator has included in his description of the object of the gift are inaccurate. If the devisee or legatee is so designated as to be distinguished from every other person, the inaptitude of some of the particulars introduced in the description is immaterial (*h*). If there is a person to answer the name given in the will, it is immaterial that any further description does not precisely apply (*i*). A gift by will to a person described as the husband, or wife, or widow of another, is not in general affected by the fact of the devisee or legatee not actually answering the description, by reason of the invalidity of the supposed marriage, or by reason of the second marriage of the supposed widow or otherwise (*k*). And on the same principle

(*b*) *Holmes v. Custance*, 12 Ves. 279.

(*c*) *Chambers v. Minchin*, 4 Ves. 676.

(*d*) See *Smith v. Mailland*, 1 Ves. Jr. 363.

(*e*) *Taylor v. Richardson*, 2 Drew. 16; *Ives v. Dodyson*, 9 Eq. 401.

(*f*) *Jarm. on Wills*, vol. 1, p. 423.

(*g*) *Door v. Geary*, 1 Ves. 255; *Selwood v. Mildmay*, 3 Ves. 306; *Jarm. on Wills*, vol. 1, p. 423.

(*h*) *Jarm. on Wills*, vol. 1, p. 428.

(*i*) *Standen v. Standen*, 2 Ves. Jr. 589; *Del Mare v. Robello*, 3 Bro. C. C. 446; *Holmes v. Custance*, 12 Ves. 279.

(*k*) *Giles v. Giles*, 1 Keen, 685,

a legacy to a person described as the testator's intended wife, has been held to be payable although the testator did not eventually marry her (*l*). A different rule, however, prevails where a fraud has been practised on a testator, the knowledge or discovery of which, there is reason to believe, would have destroyed or removed the motive for the gift. When, for example, a testatrix under a power of appointment bequeathed a legacy to a man whom she described and with whom she lived as her husband, but the marriage was invalid on account of his having a wife at the time, which fact was not known to the testatrix, the bequest was held void (*m*). The question in all such cases is, whether the mistake of the testator has been induced by the fraud of the object of his intended bounty. Though it is clear that a legacy given to a person in a character which the legatee does not fill, and by the fraudulent assumption of, which character the testator has been deceived, will not take effect; yet, if the testator is not deceived, although a false character is in fact assumed, the legacy will be good. *A fortiori* it will be good, if both parties not only knew the actual facts, but are designedly parties to the assumption of the false character (*n*). A false reason, however, given for a legacy, is not alone a sufficient ground to avoid the act or bequest in equity. To have such an effect, it must be clear that no other motive mingled in the legacy, and that it constituted the substantial ground for the act or bequest (*o*).

If the language of a will is either capable of more than one Parol evidence in certain cases

692, 693; *Rishton v. Cobb*, 5 M. & C. 145; *Re Petts*, 27 Beav. 576.

(*l*) *Schloss v. Stichel*, 6 Sim. 1.

(*m*) *Kennell v. Abbott*, 4 Ves. 804; *Re Boddington*, 22 Ch. D. 602.

(*n*) *Giles v. Giles*, 1 Keen, 685, 692, 693.

(*o*) *Kennell v. Abbott*, 4 Ves. 802. The civil law seems to have proceeded upon the same ground. The Digest says, *Falsam causam legato non obesse verius est; quia ratio legandi l'ato non cohaeret. Sed ple-*

rumque doli exceptio locum habebit, si probetur, alias legaturum non fuisse. Dig. lib. 35, tit. 1, leg. 72, § 6. The meaning of this passage is that a false reason given for the legacy is not of itself sufficient to destroy it. But there must be an exception of any fraud practised from which it may be presumed that the person giving the legacy would not, if that fraud had been known to him, have given it. *Kennell v. Abbott*, 4 Ves. 808.

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admissible to
explain the will.

meaning, or is incapable of any certain meaning, parol evidence cannot be admitted to show what the testator intended to have expressed (*p*). The Court is not entitled to inquire into the intention of the testator apart from the language he has used (*q*). Evidence of the declaration of the intention of a testator before the making of his will with respect to the disposition of his property, and also after the will was made as to the persons in whose favour he made it, cannot be admitted (*r*). It is only where the description of the person or thing intended is applicable with legal certainty to each of several objects that extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such objects was intended by the testator (*s*). But the Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably and with sufficient certainty applied (*t*). The Court in construing a will cannot shut its eyes to the state of facts under which the will was made (*u*). Where, accordingly, a testator has inaccurately or imperfectly described the thing meant to be given by his will, so as to make the interpretation of the words in their primary sense impossible, parol evidence is admissible to influence the construction of the will (*x*). The principle is exemplified in those cases in which a devise of land at a given place has been extended to property not strictly answering to the locality, because there is none which does precisely correspond to it (*y*); or in which an

(*p*) Wigram on Wills, 95.

(*q*) *Re Rosaz*, 2 Pr. D. 68.

(*r*) *Drake v. Drake*, 8 H. L. 179 ;
Charter v. Charter, 7 E. & I. App. Ca. 370.

(*s*) *Drake v. Drake*, 8 H. L. 179 ;
Charter v. Charter, 7 E. & I. App. Ca. 370.

(*t*) *Ib.* 377, *per* Lord Cairns. See
Re Rosaz, 2 Pr. D. 68 ; *Re Brake*, 6

Pr. D. 217 ; *Baxter v. Morgan*, 7 L. R. I. 505.

(*u*) Jarm. on Wills, vol. 1, p. 422.

(*x*) *Fommereau v. Poyntz*, 1 Bro. C. C. 472 ; *Att.-Gen. v. Grote*, 3 Mer. 316 ; *Colpoys v. Colpoys*, Jac. 451 ;
Wigram on Wills, 65.

(*y*) *Doe v. Roberts*, 1 B. & Ald. 407 ; Jarm. on Wills, vol. 1, p. 423.

apparently specific bequest of stock in the public funds has been held to authorise payment of the legacy out of the general personal estate, the testator having no such stock when he made the bequest (*z*). So also if the subject of devise is described by reference to some extrinsic fact, it is not merely competent but necessary to admit extrinsic evidence to ascertain the subject of devise (*a*).

The same considerations apply when the description or terms employed by the testator are insufficient to determine the person intended by the testator. If the object of the testator's bounty, or the person meant by him, is described in terms which are applicable indifferently to more than one person, parol evidence is admissible to prove which of the persons so described was intended by the testator (*b*). So also if it appear that the name inserted in the will is not the correct name of any one in existence, the Court may look at the circumstances surrounding the testator to ascertain who was meant by him (*c*).

Before resorting to parol evidence to explain a latent ambiguity, the Court should be satisfied that the ambiguity cannot be removed by the construction of the will itself, having regard to the circumstances surrounding the testator (*d*).

If the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the meaning of the testator, evidence to prove the sense in which he intended to use them is, as a general proposition, inadmissible (*e*). Thus, evidence is inadmissible for the purpose of filling up a total blank in a will (*f*), or inserting a devise inadvertently omitted

- (*z*) *Selwood v. Mildmay*, 3 Ves. 436, and cases cited.
 306; Jarm. on Wills, vol. 1, p. 423. (c) *Re Murphy*, 7 L. R. I. 562.
 (a) *Sanford v. Raikes*, 1 Mer. 646, See *Charter v. Charter*, 7 E. & I.
 per Sir W. Grant; *Webb v. Byng*, 1 App. Ca. 382, per Lord Cairns.
 K. & J. 580; *Turquand v. Ricketts*, (d) *Healey v. Healey*, I. R. 9 Eq.
 1 H. L. 472; *Jennings v. Jennings*, 418.
 1 L. R. I. 562; Jarm. on Wills, vol. (e) Wigram on Wills, pp. 94, 98.
 1, p. 426. (f) *Baylis v. Att.-Gen.*, 2 Atk.
 (b) *Grant v. Grant*, L. R. 5 C. P. 239; *Castledon v. Turner*, 3 Atk.
 727; *Re Wolverton Mortgaged Estates*, 257; *Hunt v. Hort*, 3 Bro. C. C.
 7 Ch. D. 199; *Baxter v. Morgan*, 7 311; *Taylor v. Richardson*, 2 Drew.
 L. R. I. 501; Wigram on Wills, 109; 16.
 Jarman on Wills, vol. 1, pp. 428—

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by the mistake of the person drawing, making, or copying the will (*g*), or of proving what was meant by an unintelligible word (*h*); or of proving that a thing in substance different from that described in the will was intended (*i*); of changing the person described (*k*); or of reconciling conflicting clauses in a will (*l*).

Revocation of will under mistake.

Where a testator by a codicil revokes a devise or bequest in his will or in a previous codicil, expressly grounding such revocation on the assumption of a fact which turns out to be false, the revocation does not take effect, being, it is considered, conditional, and dependent on a contingency which fails (*m*). So, also, if a will is cancelled by mistake, or on the presumption that a later will is good, which proves void, the heir is not let in, but the mistake may be relieved against (*n*). In such case equity does not alter the will; it merely relieves the party from the effect of the mistake, thus placing him in the same condition as if the mistake had not happened (*o*).

Document signed as will by mistake.

Where a document has been signed by a man and has been duly attested in mistake for his will, it was held not admissible to probate (*p*).

Election under mistake.

An election made by a party under a mistake of facts or a misconception as to his rights is not binding in equity. In order to constitute a valid election, the act done must be with a full knowledge of the circumstances of the case, and the right to which the person put to his election was entitled (*q*). In order to presume an election from the acts of any person, that person must be shown to have had a full knowledge of all the

(*g*) *Newburgh v. Newburgh*, 5 412.

Madd. 364; Jarm. on Wills, vol. 1, pp. 412—414. It would, however, seem that if a clause be inadvertently introduced, there may be an issue to try whether it is part of the testator's will. *Ib*; Wigram on Wills, 121.

(*h*) *Goblett v. Beechey*, 3 Sim. 24.

(*i*) *Selwood v. Mildmay*, 3 Ves. 306.

(*k*) *Del Mare v. Robello*, 1 Ves. Jr.

(*l*) *Ulrich v. Litchfield*, 2 Atk. 372, *per* Lord Hardwicke.

(*m*) *Campbell v. French*, 3 Ves. 321; *Doe v. Evans*, 10 A. & E. 228; Jarm. on Wills, vol. 1, p. 183.

(*n*) *Onions v. Tyrer*, 1 P. Wms. 345.

(*o*) *Ib*.

(*p*) *Re Hunt*, 3 Pr. & Div. 250.

(*q*) *Wintour v. Clifton*, 21 Beav. 468, affirmed 3 Jur. N. S. 74.

requisite circumstances, as to the amount of the different properties, his own rights in respect of them, &c. (*r*). A person who has elected under a misconception is entitled to make a fresh election (*s*).

The Court will not inquire into the fact of whether a testator was mistaken or not with reference to his daughter's health and capacity assigned by his will as a condition for imposing a condition in restraint of marriage (*t*). Condition imposed under mistake.

The costs of the suit, in cases of mistake, depend on the conduct of the parties (*u*). Costs. If a deed is set aside or varied on the ground of mistake, the decree will be with costs against the defendant, if the suit is either wholly or mainly due to his conduct in the matter (*x*). So, also, a decree for specific performance of an ordinary agreement (*y*), or of an agreement by way of compromise (*z*) will be with costs, if the case set up by the defendant fails wholly on the merits, or the litigation has been due to his conduct in the matter (*u*). If, on the other hand, the mistake is entirely owing to the conduct of the plaintiff, he must pay all the costs of the suit (*b*). So, also, if the case set up by the plaintiff wholly fails on the merits, and the defendant has not been to blame in the matter, the bill will be

(*r*) *Wake v. Wake*, 1 Ves. Jr. 335, and the other cases mentioned; 1 Sw. 381 n.; *Reynard v. Spence*, 4 Beav. 103; *Edwards v. Morgan*, 13 Pri. 782, 1 Bligh, N. S. 401; *Brice v. Brice*, 2 Moll. 21.

(*s*) *Kidney v. Coussmaker*, 12 Ves. 136; Jarman on Wills, vol. 1, p. 471.

(*t*) *Morley v. Rennoldson*, 2 Ha. 584.

(*u*) *Mortimer v. Shortall*, 2 Dr. & War. 373; *Alcanley v. Kinnaird*, 2 Mac. & G. 9; *Harris v. Pepperell*, 5 Eq. 1; *supra*, p. 460.

(*x*) *Bingham v. Bingham*, 1 Ves. 126; *East India Co. v. Donald*, 9 Ves. 275; *Dacre v. Gorges*, 2 Sim. & St. 456; *Sturge v. Sturge*, 12 Beav. 245;

Meadows v. Meadows, 16 Beav. 404; *Coward v. Hughes*, 1 K. & J. 451; *Cox v. Bruton*, 5 W. R. 544; *Lenty v. Hillas*, 2 D. & J. 122; *Broughton v. Hutt*, 3 D. & J. 501; *Broun v. Kennedy*, 33 Beav. 154; *Harris v. Pepperell*, 5 Eq. 1.

(*y*) *Parker v. Taswell*, 2 D. & J. 576; *Dyas v. Stafford*, 7 L. R. I. 605.

(*z*) *Attwood v. —*, 1 Russ. 353, 5 Russ. 150; *Houghton v. Lees*, 1 Jur. N. S. 862.

(*a*) *Parker v. Taswell*, 2 D. & J. 576.

(*b*) *Harris v. Pepperell*, 5 Eq. 1, per Lord Romilly; *Buscomb v. Beckwith*, 8 Eq. 109; *Besley v. Besley*, 9 Ch. D. 103.

dismissed with costs, whether the object of the suit be to rectify an instrument or to rescind a transaction (*c*).

So, also, if an action for the specific performance of an agreement be dismissed, the dismissal will be with costs, if the case of mistake as set up by the plaintiff fails on the merits (*d*). If there have been faults on both sides, costs will be given to neither, whether the object of the suit be to rectify or rescind a transaction (*e*).

Although an action for the rescission of a transaction, on the ground of mistake, be dismissed, the dismissal will be without costs, if the case of the plaintiff be a reasonable one on the merits; but his title to relief has failed through the absence of due diligence on his part in bringing the action (*f*), or because the mistake was due to his own solicitor (*g*), or because the Court could not interfere without prejudicing the rights of innocent parties (*h*). So, also, although an action for the rectification of an instrument be dismissed, the dismissal will be without costs, if the case as set up by the plaintiff be on the whole a reasonable one (*i*). So, also, although a deed be cancelled, the circumstances of the case may be such that it will be without costs (*k*). So, also, although an action for the specific performance of an agreement be dismissed, the dismissal will be without costs, if the

(*c*) *Naylor v. Winch*, 1 Sim. & St. 555; *Alexander v. Crosbie*, 11. & G. temp. Sug. 153; *Okill v. Whittaker*, 1 Deg. & Sm. 83, 2 Ph. 338; *Westby v. Westby*, 2 Dr. & War. 502; *Howkins v. Jackson*, 2 Mac. & G. 372; *Meadows v. Meadows*, 16 Beav. 405; *Ridgway v. Sneyd*, Kay, 637; *Bentley v. Mackay*, 31 Beav. 159; *Buteman v. Boynton*, 1 Ch. 368.

(*d*) *Humphries v. Horne*, 3 Ha. 276; *Morey v. Bigwood*, 4 D. F. & J. 351.

(*e*) *Hitchcock v. Giddings*, 4 Pri. 135; *Mortimer v. Shortall*, 2 Dr. & War. 373; *Murray v. Parker*, 19 Beav. 305; *Alanley v. Kinnaird*, 2 Mac. & G. 9; *Fowler v. Scottish Equitable Life Assurance Society*, 28

L. J. Ch. 228; *Garrard v. Frankel*, 30 Beav. 459; *Price v. Ley*, 11 W. R. 475; *Harris v. Pepperell*, 5 Eq. 1, *supra*, p. 460.

(*f*) *Stone v. Godfrey*, 18 Jur. 166; *Bloomer v. Spittle*, 13 Eq. 429; but see *Stone v. Godfrey* on appeal, 5 D. M. & G. 93.

(*g*) *Bloomer v. Spittle*, 13 Eq. 429.

(*h*) *M'Alpine v. Swift*, 1 Ba. & Be. 293.

(*i*) *Cockerell v. Cholmeley*, Taml. 445, 1 R. & M. 425; *Ashhurst v. Mill*, 7 Ha. 515, 516; *Barrow v. Barrow*, 18 Beav. 537; *Lord Bradford v. Lord Romney*, 30 Beav. 441; *Bloomer v. Spittle*, 13 Eq. 429.

(*k*) *Philippson v. Kerry*, 32 Beav. 638.

defendant has been to blame in the matter, either by mistaking the terms of the agreement or by other acts of negligence, and the refusal of the Court to interfere has proceeded merely on considerations as to the hardship to which the defendant would be exposed by being compelled to perform his agreement specifically (*l*). So, also, where there has been a mutual misunderstanding (*n*), or the nature of the defence has been in some respects unfounded (*n*), or where the terms of the contract are ambiguous, so that the one party may have reasonably put a different construction on the contract from what was contemplated by the other (*o*), an action for specific performance will be dismissed without costs. And so where parol evidence was admitted in opposition to specific performance (*p*).

If parol evidence to vary the contract is introduced by the defendant, the action should be strictly dismissed; and, therefore, if the Court makes a decree at plaintiff's desire for specific performance of the contract according to defendant's evidence, the plaintiff must pay costs (*q*). But inasmuch as parol evidence to vary the contract cannot be admitted on the part of the plaintiff to a bill for specific performance (*r*), an action for the specific performance of a contract with parol variation, though left out by fraud, was dismissed, but without costs (*s*).

(*l*) *Malins v. Freeman*, 2 Keen, temp. Cott. 382; *Buxendale v. Seale*, 32; *Manser v. Back*, 6 Ha. 443; 19 Beav. 613.
Wood v. Scarth, 2 K. & J. 33; *Webster v. Cecil*, 30 Beav. 64; *Bray v. Briggs*, 20 W. R. 962.

(*n*) *Calverley v. Williams*, 1 Ves. Jr. 210; *Stratford v. Bosworth*, 2 V. & B. 342. See *Clowes v. Higginson*, 1 V. & B. 524.

(*o*) *Andrew v. Aitken*, 22 Ch. D. 218.

(*o*) *Ncap v. Abbott*, 1 C. P. Coop.

(*p*) *Townshend v. Stangroom*, 6 Ves. 328; *Garrard v. Grinling*, 2 Sw. 250.

(*q*) *Fife v. Clayton*, 13 Ves. 546; *Mortimer v. Orchard*, 2 Ves. Jr. 243.

(*r*) *Supra*, p. 495.

(*s*) *Woollam v. Hearn*, 7 Ves. 211; *Lord Portman v. Morris*, 2 Bro. C. C. 219. See *Clowes v. Higginson*, 1 V. & B. 524.

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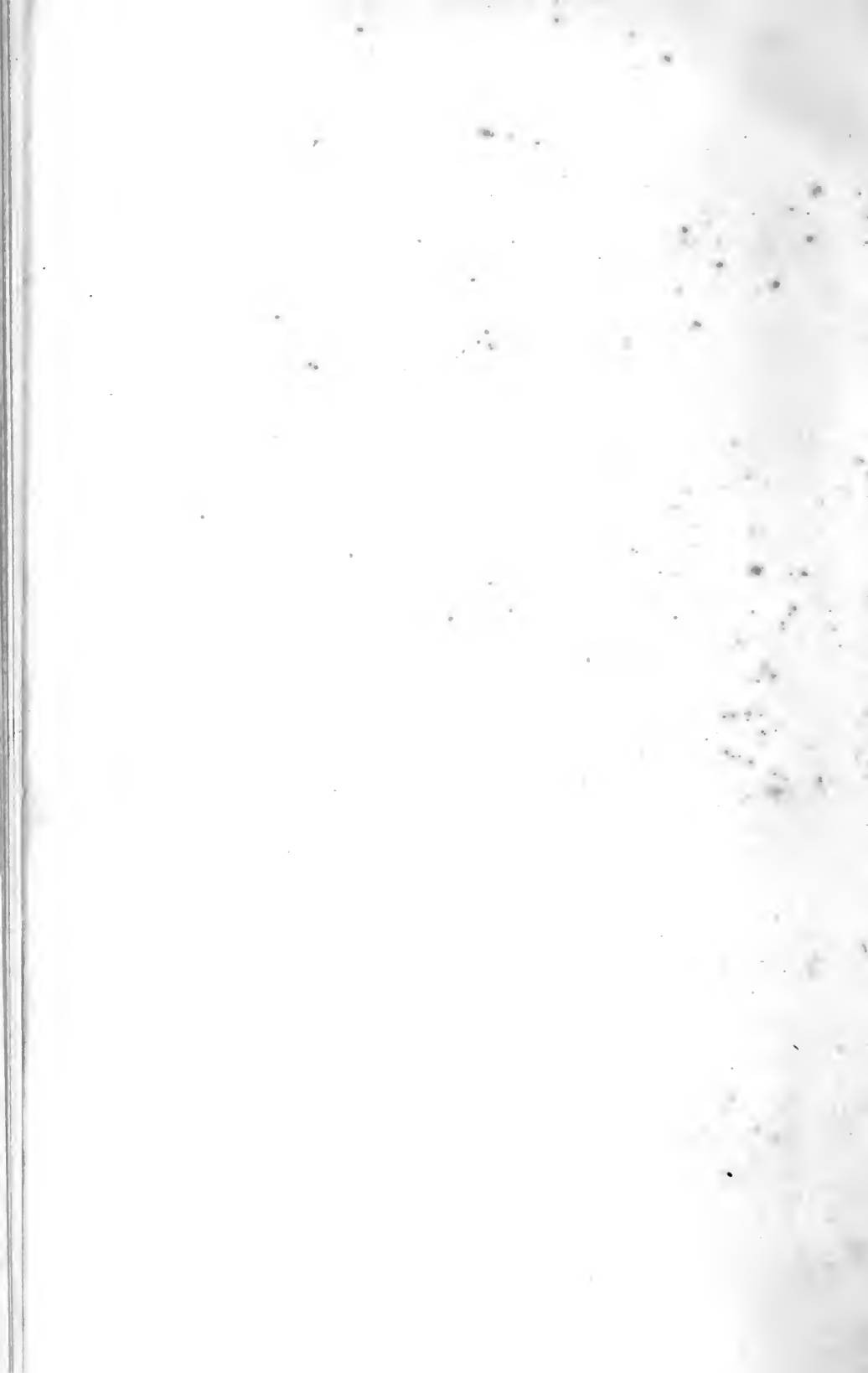
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